UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

FORTUNA ENTERPRISES, L.P.,
A DELAWARE LIMITED PARTNERSHIP
D/B/A THE LOS ANGELES AIRPORT
HILTON HOTEL AND TOWERS
Respondent

Cases 31-CA-27837
31-CA-27954
31-CA-28011

and

UNITE HERE, LOCAL 11
Charging Party

ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL
TO THE RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

To:
Lester A. Heltzer, Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
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INTRODUCTION

Respondent's Brief in Support of its Exceptions should be dismissed as it is substantially based on Administrative Law Judge John J. McCarrick's (ALJ) credibility findings, which as detailed herein, are properly rooted in relevant fact and law and supported by the entire record. As such, based on the Board's long established policy not to overrule an ALJ's credibility resolutions unless a heavy burden is met, as set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), Respondent's request to overrule the ALJ decision should be denied.

STATEMENT OF THE CASE

The Unite Here Local 11 (Union) began a public organizing drive at Respondent's Hotel (Hotel) in late January 2006 and had several employee delegations from February through May 2006[1]/ to protest working conditions and present grievances to management. The evidence proved that Respondent's upper management refused to address the employees' grievances and instead reacted with an anti-Union crackdown that targeted known Union supporters with unlawful discipline, threats, and physical acts of intimidation. Respondent's anti-Union reaction resulted in the numerous Section 8(a)(1) violations properly found by the ALJ as supported by the record through credibility determinations which should not be overruled as Respondent so wishes. These violations of Section 8(a)(1) as found by the ALJ's findings and conclusions are discussed in Section I of this Answering Brief.

The evidence also established that in response to Respondent's anti-Union crackdown, and to protest the recent termination of a prominent employee Union leader, on May 11, over 77 employees gathered in Respondent's employee cafeteria (the "Employee Cafeteria") in an attempt to meet with a responsible Hotel management representative. The credible testimony and relevant evidence proved that after having waited unsuccessfully for about two hours for a management

[1]/ All dates are for the year 2006 unless otherwise indicated.

15; Resp. Ans. p. 3.) Barajas worked with co-worker cook Ricardo Molina, who was also supervised by Sous Chef Hebert. (Tr. 241:5-16; 1140:17-23.) Barajas testified that on about March 3, he attended a Union meeting where he saw co-worker Ricardo Molina. The next day, while at work and while Barajas was signing out for his lunch, Ricardo Molina was cooking on the broiler when Barajas witnessed Sous Chef Hebert approaching Molina and asking Molina how the Union meeting had gone and if Molina had gone to the meeting. Molina did not respond to Hebert. (Tr. 241:5-242:20; 1137:13-18.)

In finding that Hebert's questioning of Molina violated the Act as alleged, the ALJ determined that Respondent "Hebert's testimony generally lacked credibility" while it credited General Counsel's witness. (ALJ Decision, footnote 3, p. 4:48-51) As such the ALJ properly relied on this credibility resolution to reach his decision. Likewise, this conclusion was properly supported by applicable case law cited by the ALJ under *Metropolitan Regional Council*, 352 NLRB No. 88, slip op. pp. 14-15 (June 2008) (where the Board found unlawful a manager's questioning of an employee when, in the days following a union meeting, and during work, the manager asked the employee "how the union went, what was said in the meeting.") *See also Emery Worldwide*, 309 NLRB 185, 186 (1992).

a. The ALJ Properly Credited Barajas Testimony as a Matter of Board Policy and/or Under a Hearsay Exception

Even though Barajas testified that he heard supervisor Hebert interrogate employee Molina, said testimony, as more fully set forth below, was properly relied on by the ALJ as it was both admissible as a matter of Board policy and/or admissible under a hearsay exception. Respondent's arguments for overruling this conclusion of law is misplaced for several reasons: First, on procedural grounds, Respondent did not object to its admissibility at trial on any grounds

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[2]/ This Answering Brief will use the following citation abbreviations: "Tr." for Transcript; "CGC." for Counsel for General Counsel; "Res." for Respondent; "Ex." for Exhibit, and "Jt." for Joint.

and thus waived any right to do so thereafter. Second, in substantive terms, in any event, there is a hearsay exception under Federal Rules of Evidence (FRE) 807, which holds in part:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these and the interests of justice will best be served by admission of the statement into evidence.

Further, given the credibility determinations noted above, including that Barajas testified while employed by Respondent, said circumstances support the trustworthiness of Barajas' testimony. Finally, even if deemed hearsay, the ALJ's reliance on Barajas' testimony as substantive evidence of the alleged violation was proper as it has been generally recognized that the Board is not bound to follow the strict rules of evidence applicable in the Federal Courts and, where appropriate, may "admit hearsay evidence and give it such weight as its inherent quality justifies." *Alvin J. Bart and Co., Inc.*, 236 NLRB 242, 242 (1978), enf. denied on other grounds.

The ALJ therefore properly found and concluded based on the relevant facts and case law that Hebert's interrogation of employee Molina about a union meeting violated the Act as alleged in Complaint (Complaint) paragraph No. 8. (ALJ Decision P. 4:37-38) Further, as noted above, because these findings were largely based on the ALJ's discrediting Respondent's defense witness Hebert and crediting General Counsel witnesses, and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products, supra.*, the ALJ's conclusion of law should stand and Respondent's exception on this point should be dismissed.

2. <u>The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That the Coercive Pushing of Employees by Banquet Chef Pablo Burciaga Violated the Act as Alleged in Complaint Paragraph No. 9. (ALJ Decision P. 5:36-38)</u>

Contrary to Respondent's contention, the ALJ's finding and conclusions of law noted above are properly supported by the entire record. The credible evidence established that kitchen employees Antonio Campos and Juan Banales had worked for Respondent as cooks for 24 years and 16 years, respectively. (Tr. 54:13-24; 55:25; 209:10-210:12.) During 2006, both Campos and Banales were supervised by admitted Section 2(11) supervisor Banquet Chef Pablo Burciaga ("Burciaga"). (Tr. 55:2-18; 210:13-15.) In April, cooks Campos, Banales, and Chan, along with about 14 to 20 co-workers, gathered in the kitchen to discuss the lack of kitchen equipment with admitted Section 2(11) supervisors Manny Collera and Efrain Vasquez. (Tr. 61:13-62:9; 210:23-213:9.) The area of the kitchen where the discussion occurred was a non-public area, away from guests, and an area where employees would normally gather and talk about non-work related issues. (Tr. 66:15-18; 82:1-83:16; 214:21-215:12; 1091:13-24.) As the employee discussion started, another supervisor notified Burciaga of the employee gathering. (Tr. 1016:22-1018:11; 1042:23-1044:16.)

As properly found by the ALJ, while the employees were discussing the kitchen problems with supervisors Collera and Vasquez, out of nowhere and suddenly, Banquet Chef Supervisor Burciaga approached the employee group and physically grabbed employee Herman Chan by the shoulder pushing him away from the meeting/delegation. (Tr. 65:21-67:2; 84:22-85:11; 216:8-217:8; 219:15-221:14.) Burciaga then assaulted Juan Banales as well by grabbing him by the shoulder and pushing him away from the meeting. *Id.* Next, Burciaga grabbed Campos and pushed him away from the meeting. *Id.* Banales, Campos, and Chan were led away and were no longer able to participate in the kitchen discussion. (Tr. 69:18-20; 220:24-221:13.) Burciaga was aware the employee delegation was Union related when he pulled Campos, Chan, and Banales away from it. (Tr. 1042:23-1044:16.)

As supervisor Burciaga physically pulled employees Campos, Banales, and Chan away from the meeting, another employee who was present at the meeting, Mike Kaib, turned to help his co-workers. (Tr. 67:3-69:10; 217:9-218:10; 1026:18-1029:16.) Kaib turned and approached Burciaga telling him to leave them (Campos, Banales, and Chan) alone and not to push them, that they were not doing anything wrong. *Id.* Supervisor Burciaga turned to confront Kaib and jabbed Kaib in the chest with his index finger telling Kaib to "shut up" and that it was "none of [his] business." *Id.*

In finding and concluding that Banquet Chef Burciaga's pushing of employees was coercive and that it violated the Act as alleged, the ALJ "[did] not credit Burciaga's testimony" and properly relied on this credibility resolution to reach his decision. (ALJ Decision, Footnote 4, p. 5:47-51.)

Likewise, this conclusion was properly supported by the ALJ's reliance on *Impressive Textiles, Inc.*, 317 NLRB 8, 12-13 (1995) (holding that that an 8(a)(1) violation was found where the company owner approached employee "A" who was talking to another co-worker about union related information during his break and aware of their union conversation, the owner ended the conversation by pushing employee "A" telling him to return to work). See also *Cox Fire Protection*, 308 NLRB 793 (1992) (owner's statement "this isn't a threat, but I want to kick your ass," held violative of Section 8(a)(1) as employees could reasonably fear that the owner was clearly disposed to unfavorably exercising his authority as an employer against any employee involved in protected concerted activity.)

As such, the ALJ properly found and concluded based on the admissible facts and applicable case law that the coercive pushing of employees by Banquet Chef Pablo Burciaga violated the Act as alleged in Complaint paragraph No. 9. (ALJ Decision P. 5:36-38.) Further, as noted above, because these findings were largely based on the ALJ's discrediting Respondent's

defense witness Pablo Burciaga and crediting General Counsel witnesses, and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products*, *supra.*, the ALJ's conclusion of law should stand and Respondent's Exception on this point should be dismissed.

3. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That Banquet Chef Pablo Burciaga Unlawfully Threatened Employee Campos With Physical Harm as Alleged in Complaint Paragraph No. 10. (ALJ Decision P. 6:19-21)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible evidence established that about 30 to 45 minutes after employee Campos attended the April kitchen meeting, supervisor Burciaga went back looking for Campos at his work station and told Campos, one-on-one, that unless he was on break, Campos was not allowed to be with his coworkers in the same area where the meeting/delegation had previously occurred. (Tr. 69:23-70:14.) When Campos asked Burciaga what would happen if instead it was Campos' co-workers who approached him at his [Campos'] work station, Burciaga responded with words to the effect that Burciaga "would fire [or "fuck"][3]/ them to shits along with you (Campos)" and/or "I will kick your asses out of here including you." (Tr. 70:15-71:10; 99:5-102:17.)

In finding and concluding that Banquet Chef Pablo Burciaga unlawfully threatened employee Campos with physical harm as alleged, the ALJ "[did] not credit Burciaga's testimony" and properly relied on this credibility resolution to reach his decision. (ALJ Decision, Footnote 4, p. 5:47-51.)

Likewise, this conclusion was properly supported by the ALJ's reliance on *Cox Fire Protection*, 308 NLRB 793 (1992) (owner's statement "this isn't a threat, but I want to kick your ass," held violative of Section 8(a)(1) as employees could reasonably fear that the owner was

clearly disposed to unfavorably exercising his authority as an employer against any employee involved in protected concerted activity.) See also *New Life Bakery*, 301 NLRB 421, 428 (1991) enfd. 980 F.2d 738 (9th Cir. 1992). (It has long been held that "[f]ew actions have a more direct tendency to coerce employees in the exercise of their statutory rights than threats of physical harm and genuine acts of physical violence").

As such, the ALJ properly found and concluded based on the facts and applicable case law that Banquet Chef Pablo Burciaga unlawfully threatened employee Campos with physical harm as alleged in Complaint Paragraph No. 10. (ALJ Decision P. 6:19-21) Further, as noted herein, because said findings were largely based on the ALJ's discrediting Respondent's defense witness Pablo Burciaga and crediting General Counsel witnesses, and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products*, *supra.*, the ALJ's conclusion of law should stand, and Respondent's Exception on this point should be dismissed.

4. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That Parking Manager Draper Unlawfully Interrogated Employee Ortiz About Her Participation in an Employee Meeting as Alleged in Complaint Paragraph No. 11. (ALJ Decision P. 7:4-9)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible testimony that Yazmin Ortiz ("Ortiz") worked for Respondent as a parking cashier in 2006 and was supervised by admitted Section 2(11) supervisor Chriss Draper. (Tr. 793:14-794:19.) Around April, Ortiz attended an employee Union delegation at work that took place in the kitchen to discuss Respondent's unfounded accusations that employees were sabotaging the kitchen. (Tr. 801:12-802:25; 1160:2-25.) Ortiz' supervisor Chriss Draper knew of Ortiz' Union and concerted activities prior to April. (Tr. 1238:12-1239:6.) About three days after this April kitchen delegation, while at work, Chris Draper summoned Ortiz to his office for a one-on-one meeting. (Tr. 804:4-805:18; Res. Ex. 11.)) As properly concluded

[3]/ Spanish Interpreter for Campos, Al Freeman, also translated Burciaga's statement to mean "fuck."

by the ALJ, while at this meeting the evidence established Draper initiated and interrogated Ortiz about her participation in the kitchen delegation by asking if she had attended the meeting in the kitchen, (Tr. 805:23-806:16)

In finding and concluding that Parking Manager Draper unlawfully interrogated employee Ortiz as alleged, the ALJ made credibility determinations about the witnesses in ruling that "[t]he only credible evidence concerning this allegation is that Draper asked Ortiz if she had attended a kitchen meeting." (ALJ Decision p. 7:4-5) As such, the ALJ relied properly relied on this credibility resolution to reach his decision. (ALJ Decision, p. 7:7-9.)

Likewise, this conclusion was properly supported by the ALJ's reliance on *Rossmore House*, 269 NLRB 1176 (1984). See also *Palms Hotel and Casino*, 344 NLRB No. 159 (2005), where the Board ruled that the employer violated Section 8(a)(1) of the Act when it questioned an employee about protected concerted activity during the employee's work time.

As such, the ALJ properly found and concluded based on the admissible facts and applicable case law that Parking Manager Draper unlawfully interrogated employee Ortiz about her participation in an employee meeting as alleged in Complaint Paragraph No. 11. (ALJ Decision p. 7:4-9) Further, as noted above, because said findings were largely based on the ALJ's credibility determinations "under all of the circumstances," *Id.*, and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products*, *supra.*, the ALJ's conclusion of law should stand and Respondent's Exception on this point should be dismissed.

5. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion that Respondent, by Security Guard Argueta, Violated Section 8(a)(1) by Barring Employees From Entering Its Facility For Wearing Union T-Shirts and by Threatening Employees if They Entered the Hotel Wearing Union T-shirts, as Alleged in Complaint Paragraph No. 14. (ALJ Decision P. 8:41-43)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible evidence established that Beatriz Reyes

("Reyes") and Ana Maria Mendez ("Mendez") had worked for Respondent for over eight years and remained so employed at the time of the hearing. (Tr. 927:15-928:3; 989:21-990:9.) In 2006, they both worked as on-call banquet servers and were supervised by admitted Section 2(11) Banquet Supervisor Charles Perera. (Tr. 927:22; 928:18-20; 990:4; 990:24-991:1.) During 2006, it was normal practice for Reyes and Mendez to physically pick up their paychecks at the Hotel by entering either through the main entrance or the rear loading dock. (Tr. 929:17-930:19; 991:6-13; Res. Ex. 6.)

As properly concluded by the ALJ, around April, both Reyes and Mendez, after attending a Union march, attempted to enter the Hotel through the loading dock to pick up their pay check as they had done in the past. (Tr. 929:25-932:18; 991:14-992:12.) Both Reyes and Mendez were wearing red Union t-shirts that read "Unite Here!" (Tr. 931:17-932:7; 992:16-993:9.) As Reyes and Mendez tried to enter the Hotel, they were stopped by security guard Daisy who closed the Hotel doors on them because they were wearing Union-t-shirts. (Tr. 932:15-23; 992:10-19; 994:18-20.) Daisy Arguenta in 2006 worked as security guard and is an admitted Section 2(13) agent of Respondent. (Respondent's Answer, p. 3.) Arguenta at the same time told Reyes and Mendez that they could not enter the Hotel with the Union T-shirts and that if Reyes and Mendez did not want to have any problems, that they better stay out of the Hotel or to take the T-shirts off. (Tr. 933:8-13; 994:10-20)

The record also demonstrated that Reyes and security guard Arguenta have known each other for a long time as they have communicated with each other at the Hotel. (Tr. 994:23-995:4.) Both Reyes and Mendez testified that on prior occasions, they have never been prevented from entering the Hotel through the loading dock to pick-up their paychecks while wearing regular, non-union T-shirts. (Tr. 934:16-22; 998:19-999:6.)

In finding and concluding that Respondent, by Security Guard Argueta, violated Section 8(a)(1) by barring employees from entering its facility for wearing Union T-shirts and by threatening employees if they entered the Hotel wearing Union T-shirts, as alleged, the ALJ properly disregarded Respondent's contention that because Mendez and Reyes nevertheless ignored the threat and entered the Hotel a few minutes later and through another door, that such threat was a *de minimus* violation. (ALJ Decision p. 8:33-34) In other words, Respondent, while not denying the violation, urges the Board to turn a blind eye to a violation of the law simply because the employees whose Section 7 rights were violated had the courage to exercise their rights and find a different way to enter the Hotel wearing Union T-shirts to pick up their paychecks. As such, the ALJ properly ruled, as supported by the evidence noted above, that "Here, the security guard's unsuccessful attempts to bar employees who were displaying Union shirts from entering the hotel, does not establish that her threats and attempts to preclude employees from gaining access were not coercive and chilling of the employees Section 7 rights." (ALJ Decision, p. 8:38-41)

Likewise, this conclusion was properly supported by the ALJ's reliance on *Mediplex of Wethersfield*, 320 NLRB 510 (1995), where the Board ruled that an employer violated Section 8(a)(1) of the Act when, because of activities in support of a union, the employer restricted access to its facility even in times when the employee was not on duty. See also *Republic Aviation Corp.*, 324 U.S. 793 (1945), which held that employees have a Section 7 right to wear union insignia at work, except under special circumstances not present here.

The ALJ properly found and concluded based on the admissible facts and applicable case law that Respondent, by Security Guard Argueta, Violated Section 8(a)(1) by barring employees from entering its facility for wearing Union T-shirts and by threatening employees if they entered the Hotel wearing Union T-shirts, as alleged in Complaint Paragraph No. 14. (ALJ Decision P.

8:41-43.) Respondent's argument that because the employees were brave enough to ignore the threat and find an alternative way to enter the Hotel while wearing Union T-shirts, was properly disregarded by the ALJ. As such, the ALJ's conclusion of law as noted herein should stand and Respondent's Exception on this point should be dismissed.

6. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That Parking Manager Chriss Draper Coercively Threatened Employee Johnson as Alleged in Complaint Paragraph No. 16. (ALJ Decision P. 9:11-13)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible evidence established that Whitney Johnson ("Johnson") had worked for Respondent as a valet cashier during 2006 (Tr. 920:6-20.) Johnson was supervised by admitted Section 2(11) supervisor Chriss Draper, who prior to May 11, knew Johnson had participated in Union or other protected concerted activities. (Tr. 921:7-11; 1239:7-1240:13.) On about May 11, the day many of Respondent's employees congregated in the employee cafeteria, as more fully set forth below in section II, while at work and just before Johnson's 10 a.m. departure time-off, Johnson was on the second booth of self parking kiosk of the Hotel when supervisor Draper approached her and, one-on-one, threatened her with suspension if she joined the Union gathering in the employee cafeteria. As Johnson testified and as correctly credited by the ALJ, Draper told her: "Whitney, the union is downstairs at the employee cafeteria. If you go down there, you will get a suspension, and I don't want to do that." (Tr. 925:15-23) Johnson did not go support her fellow employees but closed her accounts, clocked out, and went home. ((Tr. 926:2-7)

Respondent's basis for overruling the ALJ's finding and concluding that parking Manager Chriss Draper coercively threatened employee Johnson as alleged, is that "the ALJ should have credited Draper's affirmative testimony that he did not mention anything to Johnson about the employee cafeteria or the policy." The ALJ certainly made the credibility determination that

Draper in fact did threaten Johnson as alleged and such resolution was properly supported by the evidence as noted above and should not be overturned based on the standards set forth by *Standard Dry Wall Products, supra.*

Likewise, this conclusion was properly supported by the ALJ's reliance on *Johnie Johnson Tire Co.* 271 NLRB 293, 294 (1984) (violation found where supervisor told employee involved in protected group delegation to "go back to work before he got fired."); see, e.g., *Monarch Water Systems,* 271 NLRB 558, 558 (1984). Further, the Board has, on numerous occasions, found an employer in violation of the Act for issuing discipline based on an employee's participation in a work stoppage. See, e.g., *Vencare Ancillary Services*, 334 NLRB 965, 968-971 (2001), enf. denied 352 F.3d 318 (6th Cir. 2003); *Health Care & Retirement Corp.*, 310 NLRB 1002, 1017-1018 (1993); *East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996, 996 fn. 2 (1982), enfd. 710 F.2d 397 (7th Cir. 1983), cert. denied 465 U.S. 1065 (1984);

The ALJ properly found and concluded based on the admissible facts and applicable case law that parking Manager Chriss Draper coercively threatened employee Johnson as alleged in Complaint Paragraph No. 16. (ALJ Decision p. 9:11-13) Further, as noted above, because said findings were largely based on the ALJ's credibility determinations and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products, id.*, the ALJ's conclusion of law should stand and Respondent's Exception on this point should be dismissed.

7. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That Supervisor De La Rosa Unlawfully Threatened Employee Andrade as Alleged in Complaint Paragraph No. 16. (ALJ Decision P. 9:34-37)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible evidence established that Section 2(11) supervisor Rogelio De La Rosa admitted to threatening employee Fidel Andrade for engaging in Section 7 activity. Respondent, in connection with Counsel for General Counsel's Exhibit 8,

stipulated that Fidel Andrade was, on May 11, an employee Cafeteria cook and admitted Section 2(11) supervisor Chief Steward Rogelio De La Rosa was his supervisor. (Tr. 640:23-642:13.)

Counsel for General Counsel's Exhibit 8, admitted into evidence, is a narrative signed by Rogelio De la Rosa in which he admitted he made the following threat:

> "On Thursday May 11, 2006 when the employees were in the cafeteria I had Fidel Andrade ask me if anybody was going to talk to them, I told him that I did not know. He said that it was not right what I did to Fernando Vasquez to suspend him. I stated that he was not suppose to be there and that he was way over his break time and he was ask to go back to work. Then I ask him if he had signed his break and said that he was going to sign and he was going to go back to work. Then he stated that if the employees were sent home that he was going to go with them, after a while I went back to the cafeteria and saw the he was back in side with the employees, so I told him that if I see him over their again I was going to have to suspend him also, Then he stated again that if the employees were sent home he was going to leave with them so when the employees were sent home he went with them."
>
> [signed Rogelio De la Rosa 5/16/06]

(G.C. Exhibit 8.) (Emphasis added.)

Based on this writing, the ALJ properly ruled and concluded that De La Rosa threatened to suspend employee Andrade for joining fellow employee's protected concerted work stoppage in violation of Section 8(a)(1) of the Act. This conclusion was properly supported by the ALJ's reliance on *Johnie Johnson Tire Co.* 271 NLRB 293, 294 (1984) (violation found where supervisor told employee involved in protected group delegation to "go back to work before he got fired."); see, e.g., *Monarch Water Systems,* 271 NLRB 558, 558 (1984). Further, the Board has, on numerous occasions, found an employer in violation of the Act for issuing discipline based on an employee's participation in a lawful work stoppage. See, e.g., *Vencare Ancillary Services*, 334 NLRB 965, 968-971 (2001), enf. denied 352 F.3d 318 (6th Cir. 2003); *Health Care & Retirement Corp.*, 310 NLRB 1002, 1017-1018 (1993); *East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996, 996 fn. 2 (1982), enfd. 710 F.2d 397 (7th Cir. 1983), cert. denied 465 U.S. 1065 (1984);

a. The ALJ Properly Admitted and Relied on De la Rosas's Own Written Statement as a Hearsay Admission by Party Opponent

Even though Respondent's brief argues De La Rosa's statement, admitted as G.C. Ex. 8, to be inadmissible hearsay for purposes of proving the substantive violation, Respondent did not object to its admissibility and therefore waived grounds for doing so. Second, on substantive grounds, Federal Rules of Evidence (FRE) 801 (d)(2) clearly does not make it so as De la Rosa's statement would qualify as an admission by a party opponent. In relevant part, FRE 801 provides:

> (d) Statements which are not hearsay: A statement is not hearsay if . . . (2) Admission by party opponent – the statement is offered against a party and is (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. See also *Verland*, 296 NLRB 442, 448 (1989).

With regard to FRE 801 (d)(2), in *Clinton Foods Inc.*, 237 NLRB 667, 685-86 (1978), the Board ruled that a past recording of respondent's witness was, for substantive purposes, appropriately admissible as an admission by party opponent under FRE 801 (d)(2) when introduced by the General Counsel against respondent to prove its case-in-chief. Likewise, in *Chugach Management Services*, 342 NLRB, 703, 712 (2004), 163 Fed.App. 812 (11 Cir. 2006) (enforcement denied on other grounds), the Board ruled that a prior statement of respondent's witness, even though it was made outside the courtroom and not subject to cross-examination, which was introduced by the General Counsel against respondent to prove the truth of the matter asserted, was not hearsay under the FRE 801(d)(2) as such statement constituted an admission by party opponent in that said statement had been made by an agent and supervisor of respondent in that capacity. See also *Mail Contractors of America*, 347 NLRB No. 88 (2006), in which the Board held that content of letter offered by General Counsel against respondent was not hearsay as it was an admission of a party opponent under FRE 801(d)(2).)

Similar to the rulings noted above, and as implicitly found by the ALJ, De La Rosa's written statement qualifies as an admission by a party opponent and therefore admissible to prove the truth of the matter asserted. In this case De La Rosa's statement was offered against

Respondent and there was no dispute the statement was made by De La Rosa, an admitted Section 2(11) supervisor, concerning a matter within the scope of his employment, that being, the possible suspension of an employee because of a work related situation.

Further, Respondent did not call Rogelio De La Rosa to contest, rebut, or explain his own written statement. It is apparent the ALJ drew the negative inference from Respondent's failure to produce admitted Section 2(11) supervisor De La Rosa that his testimony would have been adverse to Respondent's case. *Seda Specialty Packaging Corp.*, 324 NLRB 350, 351 (1997); *Grimmway Farms*, 314 NLRB 73, 76 fn. 2 (1994)

The ALJ properly found and concluded based on the admissible facts and applicable case law that Supervisor De La Rosa unlawfully threatened employee Andrade as alleged in Complaint Paragraph No. 16 (ALJ Decision p. 9:34-37.)

8. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That Housekeeping Director Samayoa Unlawfully Threatened Employee St.Wenceslaus as Alleged in Complaint Paragraph No. 17. (ALJ Decision P. 10:21-25)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible evidence established that employee St. Wenceslaus Lawrence ("Lawrence"), began his shift at 7 a.m. on May 11. (Tr. 952:14.) He decided to take his morning coffee break around 9 a.m., unaware that anything unusual was happening in the Employee Cafeteria. (Tr. 952:21-954:3.) Lawrence did not enter the Employee Cafeteria until a few minutes before 9 a.m., at which time he also saw director Samayoa pointing her finger at various employees inside the Employee Cafeteria. A few minutes later, once inside the Cafeteria, Samayoa pointed at Lawrence himself and told him that if he stayed there any longer, he would be suspended for the rest of the day. (Tr. 954:4-11, 20-24.) Although Lawrence eventually decided to stay with the Employee Cafeteria congregants beyond his break time, he was clearly still on his break when Samayoa uttered the above threat just three or four minutes after he

had arrived in the Employee Cafeteria. (Tr. 954:4-24.) Before Lawrence could tell director Samayoa that he was on his break, Samayoa strode away to address other employees. (Tr. 955:2-15.) Lawrence was eventually disciplined with a 5 day suspension just like all the other congregants. (CGC. Ex. 11, p. 41.)

As properly found by the ALJ, since Lawrence was still on his break, and the Employee Cafeteria was an Employer-approved location for employees to take breaks in (see part II, factor 9, below), director Samayoa could have had no evidence that Lawrence was violating any Employer rules to support her suspension threat. Samayoa's threat reasonably had the effect of coercing and interfering with Lawrence's exercise of his Section 7 rights, his potential decision to stay in the Employee Cafeteria (which he eventually exercised) and learn about the grievances of the fellow employees whom he had unexpectedly encountered there. *Brunswick Hospital Center,* 265 NLRB 803, 810 (1982) ("In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them."). Respondent, by director Samayoa, thus violated Section 8(a)(1) by threatening employee Lawrence with suspension on May 11.

The ALJ properly found and concluded based on the admissible facts and applicable case law that Housekeeping Director Samayoa unlawfully threatened employee St.Wenceslaus as alleged in Complaint Paragraph No. 17. (ALJ Decision P. 10:21-25) Further, as noted above, because said findings were largely based on the ALJ's credibility determinations and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products, id.*, the ALJ's conclusion of law should stand and Respondent's Exception on this point should be dismissed.

9. The Admissible Evidence, Relevant Case Law, and Credibility Determinations Properly Support the ALJ's Finding and Conclusion That Supervisor Perrera Coercively Threatened Employee Reyes as Alleged in Complaint Paragraph No. 19. (ALJ Decision P. 11:3-4)

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. The credible evidence established that Beatriz Reyes ("Reyes"), who worked for Respondent for over eight years and remained so employed when she testified how in 2006, while at the Hotel, was coercively interrogated about the Union by her banquet supervisor Charles Perera, an admitted Section 2(11) supervisor. (Tr. 995:5-8.) Specifically, as concluded by the ALJ, in June, in the banquet supervisor's office, Reyes' supervisor Charles Perera approached Reyes and told her that, as a friend, he wanted to tell her something. (Tr. 995:5-996:10.) Perera said that he did not have any problems with Reyes because she was a good worker but, if she did not want to have problems, it would be better if she did not talk about the Union inside the Hotel. When Reyes asked if this meant she could not talk about the Union in the Hotel, Perera replied that she could talk about the Union but she had to do it outside the Hotel. (Tr. 996:12-997:3.)

In finding and concluding that Supervisor Perrera coercively threatened employee Reyes as alleged, the ALJ's decision was properly supported by *Teledyne Advanced Materials*, 332 NLRB 539 (2000) (telling employees not to talk about the union and that they could be written up if caught talking about the union violative as an unlawful threat.); see also *Leather Center, Inc.*, 308 NLRB 16 (1992), where the Board ruled as violative of Section 8(a)(1) a manager's statement to an employee that he knew she was talking to employees about the union and that she should be careful, as such remarks constituted a veiled threat of possible repercussions because of her suspected union activities. See also *Gaetano & Associates*, 345 NLRB 539 (2005) (supervisor warning to employee that she should "be careful" talking to union agent was unlawful implied threat because it conveyed the message that union activities might place her job in jeopardy).

Consequently, the ALJ properly found and concluded based on the admissible facts and applicable case law that Supervisor Perrera coercively threatened employee Reyes as alleged in

Complaint Paragraph No. 19. Further, as noted above, because said findings were largely based on the ALJ's credibility determinations and because Respondent was not able to overcome the heavy burden set forth by *Standard Dry Wall Products*, *supra.*, the ALJ's conclusion of law should stand and Respondent's Exception on this point should be dismissed.

II. THE ALJ'S FINDINGS AND CONCLUSION THAT RESPONDENT SUSPENDED 77 OF ITS EMPLOYEES FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY AS ALLEGED IN COMPLAINT PARAGRAPH NO. 6. (ALJ DECISION P. 7:4-9), ARE SUPPORTED BY THE ADMISSIBLE EVIDENCE, RELEVANT CASE LAW, AND CREDIBILITY DETERMINATIONS

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. As more fully set forth below, the ALJ's holding was properly supported by his legal and factual balancing of the 10 factors cited in *Quietflex Mfg. Co. L.P.*, 344 NLRB 1055, 1056 (2005). As such, the evidence detailed below supports the ALJ's 10-factor *Quiteflex* analysis as outlined in his decision at p.14:10-25.

1. The Evidentiary Record Fully Supports the ALJ's Findings That Employees Were Engaged in Protected Activity in Gathering to Protest the Suspension of a Fellow Employee. (ALJ Decision p. 15:8-11)

Respondent incorrectly avers that the May 11 employee gathering did not constitute protected concerted activity. In ruling the employee gathering to constitute protected concerted activity, the ALJ properly relied on *Pepsi Cola Bottling Co. of Miami Inc.*, 186 NLRB 477 (1970) for the holding that employee protests regarding employee discipline are protected regardless of whether the alleged discipline was lawful or not. The record fully supports the ALJ's conclusion as noted above in that the credible evidence established that employees engaged in the May 11 cafeteria gathering and congregation in response to Respondent's discipline of employee Reyes. (See, e.g., Tr. 626:9-25; 646:10-18.) Employee Reyes was known to other employees as a supporter of the Union by his participation in employee delegations to management. (Tr. 251:17-252:3.) From the beginning of the May 11 gathering in the Employee Cafeteria, conversations

among employees there made clear that the purpose of the gathering was to question the general manager, Grant Coonley, about employee Reyes' suspension. (Tr. 253:23-254:10; 284:18-20.) Employees thought that Respondent had disciplined Reyes in retaliation for his open support of the Union, and were concerned that Respondent might also retaliate against other employees for the same motive. (Tr. 282:20 – 284:17; 626:9-25; 831:21 - 832:7.)

Notwithstanding the remarkable (and remarkably consistent) lack of interest in the employees' May 11 motivation exhibited by Respondent's managers and agents throughout their testimony, the employees did inform Employer managers and agents that morning that the employees were in the Employee Cafeteria to question the suspension of Mr. Reyes. Employee Vargas, for example, so informed security guards and security director Graham Taylor (Tr. 287:2-18; 359:22–360:2.) and housekeeping director Anna Samayoa (Tr. 289:10-24; 832:21 – 833:10.) Moreover, given management's below-described consistent refusal on May 11 to meet with the Employee Cafeteria congregants or their delegates, whether in or out of the Employee Cafeteria, the employees could not reasonably be found to have failed to communicate to the Employer "the particulars of their grievances so as to facilitate a discussion or possible resolution of their concerns." *Waco, Inc.*, 273 NLRB 746, 747 (1984). Thus, it was correctly concluded by the ALJ that the employees were engaged in protected activity in gathering to protest the suspension of fellow employee Reyes.

2. The Evidence Supports the ALJ's Finding That The Work Stoppage Was Peaceful (ALJ Decision p. 15:13)

The issue of whether the work stoppage was peaceful constitutes the second of the ten factors considered in the *Quietflex* analysis. *Quietflex Mfg. Co. L.P.*, *supra* at 1056.) Here it is undisputed that the employees in issue engaged in no acts of violence in connection with the May 11 work stoppage and congregation. (See, e.g.,Tr. 439:13-21; 598:2-12.) Although the noise level in the employee Cafeteria may have been judged excessive by Respondent, the evidence

established the employees were talking to each other rather than yelling (Tr. 700:13 – 701:9). (See also factor 3 noted immediately for related evidence) Further, the evidence established as testified by one of the congregants, employee Magallon, that Respondent regularly held lunch-time safety-themed celebrations in the Employee Cafeteria that were noisier than the May 11 congregation and attracted an attendance that was 30 or 40 employees larger than the May 11 congregation. (Tr. 702:23 – 704:8.) There is no evidence or allegation that Respondent judged the Employee Cafeteria to be too noisy or too crowded during such celebrations.

The Respondent's comparison of a work stoppage in an ongoing labor dispute of a major hotel to the ALJ's living room should be disregarded as a tasteless and baseless ridicule of the ALJ and thus dismissed. Consequently, it was correctly concluded by the ALJ that the work stoppage was "peaceful" under the analysis set forth in *Quietflex Mfg. Co. L.P, supra.*

3. The Evidence Fully Support the ALJ's Findings and Conclusion That the Work Stoppage Did Not Interfere with Production or Deprive Respondent of Access to Its Property (ALJ Decision p. 15:15-20)

The Respondent contends in its Brief that the May 11 work stoppage interfered with Respondent's performance of services for its guests, i.e., that some Café guests had to settle for buffet rather than table service, that there was delay in cleaning guest rooms, and that full room service could not be offered for every room on May 11. (See also G.C. Ex. 12;Tr. 1983:10 – 1984:2.) Although the allegedly impacted services may have been ostensibly affected by the absence of the servers and housekeepers who chose to remain in the Employee Cafeteria during part of their scheduled shift, there is no evidence or allegation that the unit employees in issue attempted (even unsuccessfully) to prevent other employees from performing their own jobs. The unit employees in issue here chose simply to withhold their own services by participating in the work stoppage, thus committing no interference with production under Board law. *Golay & Co.*,

156 NLRB 1252, 1262 (1966), *enfd.* 371 F.2d 259, 262 (7th Cir. 1966), *cert. denied* 387 U.S. 944 (1967).

It should be clear that Respondent's contention in its Brief that the employee work stoppage unlawfully interfered with Hotel operations is not supported by the evidence and, as such, so properly ruled by the ALJ. As such, the transcripts established that Respondent agent Luis Gallardo admitted that not a single employee complained to him about conditions in the Employee Cafeteria during the entire time he spent in or near the Employee Cafeteria on the morning of May 11. (Tr. 1696:9-20.) Although Respondent's Brief points out how the food and beverage director, Tom Cook, emphasized the allegedly large operating problem created for him at the Café by the walkout of its employees during the breakfast period (Tr. 1535:6-25.) and how Cook described at length how he had to scramble, apparently at the last minute, to get temporary replacement help from employees and managers of other departments of the Hotel who helped Cook bus and serve tables (Tr. 1539:18 – 1541:20.), the record, however, established Cook's admission that his operating problem had not come as a surprise, as assistant housekeeping manager Jose Cano had warned him at 6:45 a.m., and supervisor Patricia de la Torre had confirmed subsequently, that an employee walk-out was being organized for 8:00 a.m. (Tr. 1575:1 – 1577:9; G.C. Ex. 12.) After being confronted with his own May 11th electronic mail message, G.C. Ex. 12, Cook further admitted that he had, in turn, warned general manager Coonley, owner representative Passant, and every Hotel department head in advance of the work stoppage (Tr. 1578:15 – 1579:14.), although Respondent's Brief strongly implies that Café guests had been upset about the work-stoppage situation in the Café, the record proved Cook admitted, after being confronted with his electronic mail message, that "we did ok and the guests were not upset." (Tr. 1581:3-25; CGC Ex. 12.)

With respect to Respondent's contention that it was deprived of access to its property on May 11, the below-described[4]/ visits at will through the Employee Cafeteria by housekeeping director Samayoa (with and without her deputy Cano and night manager Gallardo), during which she repeatedly admonished the striking employees while some of them shrank back in fear of her (Tr. 303:17 – 304:5; 432:12-15.), illustrate that Respondent's managers and agents were not deprived of access to the Employee Cafeteria during the work stoppage. On the contrary, the record established congregated employees were frustrated by the failure of the general manager and the food and beverage director to enter the Employee Cafeteria as requested.

Though Respondent's Brief contends that the congregating May 11 employees caused the Employee Cafeteria to become so crowded that it became unavailable to other employees, the testimony established that empty tables could in fact be seen in the Employee Cafeteria between about 8:00 a.m. and 10:30 a.m. (Tr. 478:1-3; 624:9 – 625:3; 697:2-11.) Employee Lawrence, for example, who arrived at the Employee Cafeteria seeking his usual morning coffee a little before 9:00 a.m., innocent of any advance knowledge that the congregation was taking place, experienced no difficulty in entering the Employee Cafeteria and obtaining the desired coffee. (Tr. 953:2-8; 953:24 – 954:3.) Food and beverage director Tom Cook testified that two employees had complained to him about the Employee Cafeteria on May 11, only to admit later that those two employees were managers of Respondent at times material. (Tr. 1546:22 – 1547:6; 1595:11 – 1596:4.) Respondent's witness, employee Mavel Ortiz, estimated the total number of employees in the Employee Cafeteria to have been only about 50 at about 9:00 a.m. (Tr. 1770:25 – 1771:4), an estimate remarkably consistent with Lawrence's estimate of "over 45." (Tr. 953:10-21.) Respondent's then-parking manager, Chriss Draper, an admitted Section 2(11) supervisor and/or Section 2(13) agent of Respondent (Respondent's Answer to Consolidated Complaint, G.C. Ex.

[4]/ For an overview of Samayoa's initial visits to the Employee Cafeteria on May 11, see below under factor five.

1(p) at paragraph 5), noticed nothing unusual when he visited the Employee Cafeteria between approximately 9:30 a.m. and 10:00 a.m. looking for one of his employees. (Tr. 1246:3-12.)

Because warm food for the employees was normally served in the Employee Cafeteria only from about 10:30 a.m. onward (Tr. 474:4-9), and the May 11 congregation dissolved, by Respondent's own reckoning, at about 10:42:36 a.m. (Res. Ex. 25 at pp. 14), Respondent cannot contend that the congregation deprived employees of the benefit of warm food service. Nor can Respondent contend that the congregation deprived employees of coffee between 8:00 a.m. and about 10:30 a.m., as non-congregant employees were seen using the Employee Cafeteria during the course of the congregation. (Tr. 474:10 – 477:18; Res. Ex. 25 at pp. 3-5.) Of course, management decided that morning to convert the Café's private dining room into a temporary replacement for the employee cafeteria, but that decision can more reasonably be ascribed to Respondent's desire to prevent additional employees from being infected by the congregants' ideas than to the alleged overcrowding effects of the congregants' physical presence in the Employee Cafeteria. (Tr. 1544:7-24; 1545:8-23.)

An important fact in the record also appropriately considered by the ALJ in reaching his conclusion is that the May 11 employees chose to gather in the Employee Cafeteria not in order to remove it from Respondent's control or access but, on the contrary, because Respondent had recently decreed that the Employee Cafeteria was the only location within the premises where employees were allowed to take their breaks. (Tr. 471:21 – 473:2; 810:17-25.) By choosing the Employee Cafeteria, the congregants obeyed management policy and physically removed themselves from their actual work locations (e.g., from Respondent's restaurants, kitchens, guest rooms, guest areas, etc.). Having removed themselves from their work locations, then, the nonworking employees could hardly be accused of interfering with the work of those employees still working. *Golay & Co.*, 156 NLRB at 1262. Thus, it was correctly concluded by the ALJ that,

the work stoppage did not interfere with production or deprive Respondent of access to its property.

4. The Evidence Fully Supports the ALJ's Findings and Conclusion That the Employees Had No Adequate Opportunity to Present Their Grievances to Respondent Concerning the Suspension of Reyes (ALJ Decision p. 15:22-24.)

Respondent's Brief portrays the position that it had an established and effective procedure for employees to present concerns to management, and that management had, before May 11, repeatedly expressed a willingness to meet with employees under its "Open Door Policy." The record evidence, however, supports the ALJ's findings conclusion that, within the scope of the May 11 work stoppage, the employees here at issue did not have adequate opportunity to present grievances to management. (Tr. 75:7 – 76:4; 2124:13 – 2125:4; 2323:19 – 2326:5.)

As such, the evidence established and it was not in dispute that Respondent's general manager and food and beverage director failed to appear at the Employee Cafeteria to discuss the striking employees' concerns regarding Reyes' suspension. (CGC. Ex. 12.) General manager Coonley, though alerted about the congregation at least an hour before it began (CGC. Ex. 12), evidently chose not to be on the premises. (Tr. 2326:13 – 2327:11.) It is not in dispute that Coonley resides in the Hotel itself. (Tr. 791:18-24.) The security department notified food and beverage director Tom Cook at about 8:10 a.m. that he was wanted in the Employee Cafeteria, but Cook chose not to go. (CGC. Ex. 12.) While waiting for either of the referenced managers to arrive, the Employee Cafeteria congregants were suspended by housekeeping director Samayoa. (Tr. 1901:4-24; 1905:4-16; 1908:1-13; 1909:1-4.) Finally, when a small delegation of congregants ventured upstairs in search of the food and beverage director, the latter failed to see them: far from an opportunity to present their grievance, the congregants received from the managers they sought out only confirmations of their mass suspension. (CGC. Ex. 12; Tr. 308:12 – 310:20.)

More broadly, Respondent's reactions to the series of employee "delegations" in 2006, described in General Counsel's Post Hearing Brief reveal the Employer's repeated refusal to discuss collective problems with groups of employees, much less the existence of any grievance mechanism. Thus, it was correctly concluded by the ALJ that, within the scope of the May 11 work stoppage, the employees here at issue did not have adequate opportunity to present grievances to management.

5. The Evidence Fully Supports the ALJ's Findings and Conclusion That the Employees Were Unlawfully and Prematurely Warned That They Must Leave the Premises or Face Discipline (ALJ Decision, p. 15:35-49.)

The testimony (discussed immediately below) regarding May 11 of employee witnesses (who were still employees of Respondent at the times of their testimony) supports the ALJ's finding that Respondent threatened the Employee Cafeteria congregants with suspension as early as 8:15 or 8:20 a.m., and establish the ALJ's conclusion as noted above that housekeeping director Samayoa began to carry out actual suspensions not later than about 9:00 a.m. on May 11.

In particular, the ALJ's findings and conclusions as to factor 5 noted in *Quiteflex Manufacturing Co., supra* is further established by the following evidence in the record: cook Alberto Barajas entered the Employee Cafeteria around 8:03 a.m.; around 8:20 a.m. he saw and heard housekeeping director Samayoa announce that the congregants must return to work or be suspended. (Tr. 244:4-8; 244:12 – 245:6.) Server Patricia Simmons, around 8:15 a.m., heard Samayoa announce that the congregants not on break must go home or be suspended. (Tr. 416:19 – 418:7.) Server Miguel Vargas heard Samayoa, apparently a few minutes after his 8:02 a.m. arrival by the Employee Cafeteria, direct the congregants to punch in or go home; a "little bit" of time later, Samayoa added the threat of suspension. (Tr. 286:15-19; 288:5-6.) Room service server Dolores Mauricio Hernandez arrived at the Employee Cafeteria around 8:07 a.m., and

around 8:15 a.m. witnessed director Samayoa asking the congregants who was on break and who was working. (Tr. 831:9-12; 832:13-24.)

In Hernandez's recollection, Samayoa then temporarily left the Employee Cafeteria and, after 10 to 15 minutes, returned accompanied by her assistant director, Jose Cano, and the then-night manager and security supervisor, Luis Gallardo: Samayoa announced that every employee in the Employee Cafeteria was suspended. (Tr. 833:11-19.) It was then around 8:30 a.m.; Hernandez saw Samayoa pointing at congregants, telling them they were suspended, and saw manager Gallardo writing down what he assumed were employees' names. (Tr. 834:5-12; 835:1-8.) Also around 8:30 a.m., employee Simmons saw Samayoa pointing a finger at congregants, telling them they were suspended. (Tr. 424:22 – 425:20.) Employee Barajas, also around 8:30 a.m., saw director Samayoa, accompanied by Cano and Gallardo, telling the congregants that they could either go back to work or be suspended, then directing her management companions to write down employee names, then suspending individually all the congregants within reach, including Barajas himself. (Tr. 245:20 – 246:6; 246:9-25.) Employee Vargas also saw Samayoa, Cano, and Gallardo writing down what appeared to be congregants' names, but placed the time somewhere between 8:30 and 9:00 a.m. (Tr. 302:23 – 303:4; 303:12-19.) Houseman St. Wenceslaus Lawrence did not enter the Employee Cafeteria until a few minutes before 9 a.m., at which time he also saw director Samayoa pointing her finger at various employees; a few minutes later, Samayoa pointed at Lawrence and told him that if he stayed there any longer, he would be suspended for the rest of the day. (Tr. 954:4-11, 20-24.) Housekeeper Lilia Magallon, also around 9 a.m.,[5]/ saw director Samayoa pointing a finger at various congregants, then telling each that they were suspended. (Tr. 592:22 – 594:10.)

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[5]/ Magallon arrived at the Employee Cafeteria around 8:15 to 8:30 a.m., and first saw director Samayoa around 8:45 to 9:00 a.m. (Tr. 590:17-23; 591:3-18.) Samayoa left the Employee Cafeteria, then returned about 5 to 10 minutes later and was seen by Magallon suspending employees, thus placing the time of the suspensions approximately between 8:50 and 9:10 a.m. (Tr. 592:22 – 594:10.

There is substantial evidence above, therefore, for the ALJ's finding that director Samayoa threatened the congregants with suspension as early as 8:15 or 8:20 a.m., and even more evidence for the ALJ's conclusion that Samayoa began to carry out actual suspensions not earlier than about 8:30 a.m. and not later than about 9:00 a.m. on May 11.

As correctly noted by the ALJ's findings and conclusions as noted in this section, Respondent's chronology, while superficially different from that of the employees above, actually leads to the same legal conclusion. Respondent presented a security video recording (Res. Ex. 24.) ostensibly reflecting a hall adjacent to the Employee Cafeteria in the course of the morning of May 11. (Tr. 1859:1-8.) Respondent represented that the continuous time stamps shown on every frame of Res. Ex. 24 are consistently ahead of the actual times by a margin of three minutes, as determined by Respondent through comparison with the punch-clocks used for payroll purposes in Respondent's Hotel. (Tr. 1856:8 – 1857:14.) That is, every event depicted on that video recording occurred, according to Respondent, three minutes earlier than shown on its corresponding time stamp.

As properly noted by the ALJ in his discussion of the fifth factor in *Quiteflex Manufacturing Co., supra.*, the evidence likewise points out to the premature and unlawful nature of Respondent's warning and discipline even using Respondent's own timeline. (All times stated in this paragraph are a.m.) Director Samayoa began the morning of May 11 with three brief visits to the Employee Cafeteria at the video recording time stamps of approximately 8:15:40, 8:23:11, and 8:26:11 (Tr. 1879:15 – 1880:16; 1885:8-16; 1886:17-22), corresponding to punch-clock times of about 8:12:40, 8:20:11, and 8:23:11 respectively. Though these times are in reasonable accord with times when employee witnesses reported seeing Samayoa in the Employee Cafeteria, Respondent urges the questionable inference that these first three visits by Samayoa went undetected by the congregants as Samayoa restricted herself to the kitchen and allegedly could not

be seen from the "seating area" of the Employee Cafeteria. Granting, arguendo, Respondent's requested inference, it follows that Samayoa's earliest Employee Cafeteria visits as seen by the congregants would have begun, respectively, at about the time stamps of 8:29:08, 8:35:16, and 9:00:21 (Tr. 1891:17-1892:1; 1898:17-1899:2; 1908:1-13) corresponding to punch-clock times of about 8:26:08, 8:32:16, and 8:57:21 a.m.

According to director Samayoa, during her 8:26:08 visit to the Employee Cafeteria she told the entire group of congregants that if they were not on break they needed to go back to work. (Tr. 1893:13-18.) During her 8:32:16 visit, she told the congregants that if they were not on break they needed to go to work or clock out and go home. (Tr. 1901:4-11.) During her 8:57:21 visit, Samayoa, assisted by assistant housekeeping director Jose Cano and night manager Luis Gallardo, announced that employees who refused both to go to work and to go home would be suspended pending investigation, and actually proceeded to suspend one-by-one the congregants who so refused. (Tr. 1909:1-18.) Thus, after making the above assumptions and inferences in the manner most favorable to Respondent, and taking into account that employees began to congregate in the Employee Cafeteria somewhat after 8:00 a.m., as it was properly done by the ALJ, it must be concluded that Respondent, by director Samayoa, began to suspend the congregants a little bit less than an hour (about 57 minutes to be exact) after the work stoppage and congregation of May 11 began.

As such, the evidence fully supports the ALJ's findings and conclusion that the peaceful work stoppage and congregation had not lost the Act's protection at the time employees were told they had to leave Respondent's facility of face suspension. (ALJ Decision, p. 15:35-36)

6. <u>The Evidence Fully Supports the ALJ's Findings and Conclusion That the Duration of the Work Stoppage and Employee Congregation Did Not Exceed a Reasonable Period of Time (ALJ Decision p. 16:2-5)</u>

The testimony supports the ALJ's findings and conclusion that on May 11 Respondent, as discussed at factor (5) above, threatened the Employee Cafeteria congregants with suspension, and actually suspended them close to an hour after the employees in issue congregated in the Employee Cafeteria. The record also established that a number of employees remained in the Employee Cafeteria after 9:00 a.m.: some still hoped for an audience with management about their concern regarding employee Reyes, others were simply disoriented by their unprecedented suspensions or felt obligated to stay in solidarity with the congregants already suspended. (Tr. 971:25 – 972:14.)

The ALJ's findings and conclusions as to factor 6 noted in *Quiteflex Manufacturing Co., supra* is further established by the following evidence in the record: In the neighborhood of 9 a.m., as director Samayoa proceeded with her one-on-one interrogations and suspensions, employee Vargas interrupted Samayoa to urge her to make instead more of an effort to find the general manager, Samayoa replied, "Yes, I will." (Tr. 304:1-5.) Vargas also asked Respondent's security director, Graham Taylor, to try to locate the general manager, and Taylor replied that he would try. (Tr. 304:23 – 305:6.) After waiting fruitlessly for a management reply, employee Vargas saw executive steward Rogelio de la Rosa, approximately between 9:00 and 9:30 a.m. in the Employee Cafeteria, asked him also to help locate the general manager, and told the executive steward that, since the employees had not had any response from management, they were ready to return to work: Rogelio de la Rosa, an admitted Section 2(11) supervisor and/or Section 2(13) agent of Respondent (Respondent's Answer to Consolidated Complaint, G.C. Ex. 1(p), paragraph 5) agreed to pass that message on to Tom Cook, the food and beverage director. (Tr. 305:24 – 306:20.) Since employee Vargas' declaration that the congregated employees were ready to return to work was made without conditions, it may be taken as marking the end of the work stoppage. The congregation in the Employee Cafeteria continued because the employees awaited

Respondent's reply to their surrender offer. In this alternative, then, the transcripts established employees attempted to end the congregation and work stoppage not later than approximately 9:30 a.m., i.e., about 1 hour and 28 minutes after the first large group of employees entered the Employee Cafeteria at 8:02:36 a.m.[6]/

In a second alternative, also established by the record which supports the ALJ's findings and conclusion noted herein, the employees' next (second) attempt at unconditional surrender may also be seen as marking the end of the congregation and work stoppage. In the neighborhood of 9:30 or 9:45 a.m., in the continued absence of any management response to the first employee offer of unconditional surrender, congregants in the Employee Cafeteria discussed the need to form an employee delegation to go to the Café in search of food and beverage director Tom Cook or other managers, in order to notify Respondent again that the congregants were ready to return to work.[7]/ (Tr. 247:19 – 248:17; 306:22 – 307:17; 430:20 – 431:14; 835:12-17; 835:20 – 836:7.) A delegation of about 10 or 11 congregants was formed, led by employee Vargas, and proceeded through the back of the house (to avoid contact with guests) to a non-guest service area adjacent to the Café and its kitchen. (Tr. 306:22 – 308:10.) There Vargas asked Café manager David

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[6]/ " 8:02:36 a.m." corresponds to the on-screen time stamp of 8:05:36. Res. Ex. 25, p. 1.

[7]/ Employee Lilia Magallon's recollection included an additional element: Magallon remembered that the congregants who were discussing the need to form a delegation told director Samayoa in the Employee Cafeteria, as a group, that if the general manager was not going to see them, then the employees wanted to go back to work. (Tr. 593:5-19; 625:8 – 626:6.) This additional element is not directly contradicted or directly corroborated by other congregant witnesses.

Aragon[8]/ to inform director Cook that, since nobody had heard their concerns downstairs, the congregants were ready to return to work. (Tr. 308:11 – 309:2.) Aragon agreed to do so, and was immediately seen speaking with director Cook inside the Café; Aragon then returned to the delegation and told its members, without further explanation, that they were suspended and could not return to work. (Tr. 309:3-20.) The employees, taken aback by Aragon's message, demanded to hear about their suspension from the food and beverage director in person; Aragon left the delegation again to obtain director Cook's presence, but the delegation saw neither Cook nor Aragon again on May 11. (Tr. 309:21 – 310:5.) At trial, Cook admitted having been told that the delegation sought to see him and that he failed to meet them, and testified erroneously that he saw employee Patricia Simmons as a member of that delegation. (Tr. 1551:10 – 1552:4; 431:4-22.) Cook further failed at trial to specifically deny that manager Aragon had told Cook about the presence of the employee delegation in the service area, or that Aragon had told Cook that the employees were ready to return to work, or that Cook had told Aragon to tell the employees that they were suspended, or that Aragon had told Cook that the employees requested to be told by Cook himself that they were suspended: on the contrary, Cook merely claimed that he could not remember those incidents. (Tr. 1584:5 – 1585:4.)

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[8]/ Respondent refused to admit that Café Manager Aragon was a 2(11) supervisor. The evidence, however, established his 2(11) status. Specifically, as Café manager, Aragon was server Vargas' immediate supervisor, and oversaw operations in the Café and would supervise Respondent's other restaurant outlets and room service whenever their supervisors needed assistance. (Tr. 315:10 – 316:4; 321:7-16.) Food and Beverage Director Tom Cook named Aragon second among several managers working under Cook. (Tr. 1574:2-12.) Aragon prepared the Café employees' work schedules, and made decisions regarding employee requests for days off and sick days. (Tr. 316:5-17.) Aragon signed employee Simmons' warning as her supervisor. (G.C. Ex. 6;Tr. 1570:1-12.) Aragon's work uniform consisted of a suit and tie, just as was the case for food and beverage director Cook, manager Collera, and other members of management. (Tr. 318:14 – 319:1.) Aragon's name tag included his position, "Restaurant Supervisor," and he conducted the pre-shift informational meetings that included work direction for the Café employees, usually by himself but sometimes with the participation of the food and beverage director or some other supervisor. (Tr. 319:2 – 320:19.) Aragon shared a locked supervisor's office with the four other restaurant supervisors. (Tr. 321:24 – 323:1.) Housekeeping director Samayoa testified that Aragon, a former employee of the food and beverage department, was a "manager or a supervisor." (Tr. 1986:13-19.) Based on the foregoing primary and secondary indicia, counsel for the General Counsel respectfully urge the Administrative Law Judge to find that David Aragon was a supervisor of Respondent under Section 2(11) and/or an agent of Respondent under Section 2(13) of the Act.

Minutes later, executive chef Rolf Jung approached the delegation to tell his kitchen employees present, including Alberto Barajas and Richard Acosta, that they were suspended. (Tr. 310:6-20.) Then director Samayoa and manager Manny Collera approached the delegation, accompanied by security director Graham Taylor and a public (Los Angeles Police Department) police officer: Vargas told the managers that the employees were ready to return to work, but manager Collera replied that the employees could not return to work, that they were suspended, and director Samayoa added, "Everybody, you're all suspended." (Tr. 311:16 – 312:16.)

Employee Vargas' immediate response was simply to discuss with the group of managers and the police officer the procedure by which the congregation would end. Vargas told them that employees were waiting in the Employee Cafeteria for an answer from management, and that Vargas needed to relay to the congregants that they were all suspended. (Tr. 312:17-20.) Security director Taylor and the police officer told Vargas that it was okay to relay the message to the congregants. (Tr. 312:21 – 313:1.) Having obtained this permission, Vargas, accompanied by his delegation, the managers, and the police officer, retraced his steps back to the Employee Cafeteria, where he informed the congregants, in English and Spanish, that they were all suspended pending investigation and must leave. (Tr. 313:7 – 314:3.) Security director Taylor may have made a similar announcement. (Tr. 1932:25 – 1933:8.) All congregants started leaving the Employee Cafeteria, in Respondent's view, at about 10:45:36 (i.e., about 10:42:36 a.m.) (Res. Ex. 25, p.14.)

As described by the record, in Vargas' estimate, the delegation was formed in the Employee Cafeteria around 9:30 to 9:45 a.m., and eventually returned to the Employee Cafeteria around 10:15 to 10:30 a.m. (Tr. 307:15-17; 313:7-12.) In Respondent's interpretation of its video recording, Res. Ex. 25, Respondent asserts that the delegation left the Employee Cafeteria about 10:15:06 (i.e., about 10:12:06 a.m.) and returned about 10:40:52 (i.e., about 10:37:52 a.m.). Res. Ex. 25, pp. 11, 13.) Here, as noted by the ALJ, we will use the times asserted by Respondent

itself. Given that the delegation was away from the Employee Cafeteria only about 25 minutes, during which time it encountered several managers in succession, it seems reasonable to estimate that the first encounter, that with restaurant supervisor Aragon, took place not later than the first half of that 25-minute period, i.e., around or before 10:24:36 a.m. If that approximate time corresponds to the moment when employee Vargas informed supervisor Aragon of the congregants' readiness to go back to work (and we ignore the earlier notice given to executive steward Rogelio de la Rosa, as well as the even earlier suspensions implemented by director Samayoa) then the duration of the work stoppage expands to approximately 2 hours 12 minutes (from 8:02:36 a.m. to 10:24:36 a.m.). But as properly found by the ALJ, even this longer view of duration would not, in itself, deprive this peaceful work stoppage and congregation of the Act's protection: as noted above, work stoppages and congregations of two hours (*Quietflex Mfg. Co., L.P.*, supra at fn. 9) and of a "few hours" (*Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB at 478) have been found protected.

Consequently, the ALJ's findings and conclusion that the duration of the work stoppage and employee congregation did not exceed a reasonable period of time was correctly sustained by the record and should not be overruled.

7. The Evidence Fully Supports the ALJ's Findings and Conclusion That the Employees Were Not Represented and Lacked an Established Grievance Procedure (ALJ Decision, p. 16:31-35.)

The issue of the existence of union representation and an established grievance procedure constitutes the seventh of the ten factors considered in the *Quietflex* analysis. *Quietflex Mfg. Co. L.P., supra* at 1057. It is undisputed that the employees herein were bereft of union representation at all times material, as this is an initial organizing situation. Respondent's Brief contention that its so-called "open door" policy served as an established grievance procedure (Tr. 1829:5-10; 1839:25 – 1841:2.) is misleading for the following reasons: Within the meaning of factor seven a

grievance procedure must be applicable to group complaints and collective issues: an employer's refusal to discuss collective issues with groups of employees reveals the absence of an established grievance procedure. *Quietflex Mfg. Co., L.P.*, supra at fn.10. An "open door" policy that applies only to individual problems rather than group complaints can be distinguished from the grievance procedure required by this factor. *HMY Roomstore, Inc.*, 344 NLRB 963, 963 fn.2 (2005). This is exactly the proper conclusion reached by the ALJ for this section.

Respondent's Brief presents its "open door" policy as fulfilling the *Quietflex* factor requirement for an established grievance procedure. (Tr. 1840:3 – 1841:1.) Respondent's Brief throws together a random assortment of employee requests at work for improved tools or accommodations of individual needs for flexibility, and represented them as examples of a working grievance procedure: thus, for example, Respondent's Brief describes individual employee requests to director Samayoa for carpet shampooer machines, or a bar code inventory system for uniforms, or more attractive carts for lobby attendants, as examples of the functioning of an established grievance procedure. (Tr. 1830:8 – 1831:17; 1832:18 – 1833:20; 1834:13-25.) In each case, however, the requests granted by management were granted of its own volition, on a case-by-case basis: there is no evidence or allegation that any "established grievance procedure" obligated management to consider, much less to discuss, any employee request.

As such, as correctly noted by the ALJ's citation of *HMY Roomstore, Inc.*, 344 NLRB 963 (2005), the ALJ properly found and concluded that Respondent's so called "open door policy" did not adequately address group grievances like the one presented in the instant case and that the employees in issue herein, then, had neither representation nor access to an established grievance procedure. *Quietflex Mfg. Co., L.P.*, supra at fn.10. (ALJ Decision, p. 16:31-35.)

8. The Evidence Fully Supports the ALJ's Findings and Conclusion that The Employees Did Not Remain on the Premises Beyond Their Shift

The issue of whether the employees remained on the premises beyond their shifts constitutes the eighth of the ten factors considered in the *Quietflex* analysis. *Quietflex Mfg. Co. L.P.*, *supra* at 1057.) The Board's traditional concern for this factor harks back to the massive sit-down strikes of the 1930s, where plant occupations were measured in days or even weeks. For example, in *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), sit-in strikers paralyzed a rare metals mill by occupying two of its buildings for nine days in defiance of a state court injunction, forcefully [and at first successfully] resisting police eviction efforts. *Id.* at 247-249.) Based on the record established in the instant case detailed below, the ALJ properly ruled that the employees did not remain on Respondent's premises beyond their shift.

As fully set by the record relied on by the ALJ, here, there is no evidence or allegation that the Employee Cafeteria congregants remained in the Employee Cafeteria, or anywhere inside the Hotel, after they began to disperse, according to Respondent, at about 10:42:36 a.m. Res. Ex. 25 at 14; see factor 6 above. Regarding the employees in issue on May 11, the one with the earliest starting time, 4:30 a.m., was cook Alberto Barajas. (Tr. 243:11-15.) There is no evidence or allegation that any of the May 11 congregants began their shift earlier than Barajas on that day; many of the congregants had recently arrived to begin their shifts around 8 a.m. The dispersal time of about 10:42:36 a.m. was therefore substantially earlier than the end-of-shift time for even the earliest-starting employee. Thus, it was correctly concluded by the ALJ that employees did not remain on the premises beyond their shifts.

9. The Evidence Fully Supports the ALJ's Findings and Conclusion That the Employees Did Not Attempt to Seize Employer's Property (ALJ Decision p. 16:40-44)

The issue of whether the employees attempted to seize the Employer's property is the ninth of the ten factors considered in the *Quietflex* analysis. *Quietflex Mfg. Co. L.P.*, *supra* at 1057. The Board's concern for this factor also harks back, as noted at factor 8 above, to the sit-down

strikes of the 1930s. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). In that era, jurists' concerns centered on whether the then-novel practice of the sit-down strike operated to deprive an employer "of its legal rights to the possession and protection of its property," where the seizure and extended holding by employees of entire workplaces threatened to amount to an ousting of the owner from lawful possession. *Id.* at 253. As in factor 8 above, based on the record established in the instant case, the ALJ properly ruled that the employees did not attempt to seize Respondent's property.

As fully established by the record relied on by the ALJ, it is clear in the instant case that the May 11 congregation mounted no challenge to Respondent's lawful possession of the Employee Cafeteria, much less to its possession of the Hotel itself. The Employee Cafeteria congregation, as discussed at factor 1 above, resulted from Respondent's suspension of a Union activist employee: there is no evidence or allegation that the congregants instead, for example, conspired to seize the Employee Cafeteria and hold it as a bargaining chip in negotiations with Respondent. Compare, e.g., *Fansteel Metallurgical Corp.*, *supra.*, where the employees refused to vacate the employer's property unless it agreed to recognize the union.

Far from constituting a threat to Respondent's lawful possession of the Employee Cafeteria, the congregants merely sought dialogue with upper management on a workplace issue of urgent concern to employees. The congregants' choice of the Employee Cafeteria as a gathering place was predetermined by Respondent itself, which had recently decreed that the Employee Cafeteria was the only location within the premises where employees were allowed to take their breaks. (Tr. 471:21 – 473:2; 810:17-25.) Far from challenging Respondent's access or control of the Employee Cafeteria (as discussed at factor 3 above), the congregants' presence there on May 11 serves as evidence of their respect and obedience to management policy on breaks and their determination to avoid interfering with employees who remained in their work areas. For

these reasons, the evidence sustains the ALJ's findings and conclusion that employees did not did not attempt to seize Respondent's property.

10. The Evidence Fully Supports the ALJ's Findings and Conclusion That Respondent Had No Valid Reason to Suspend Its Employees Other Than for Having Participated in the Work Stoppage

The evidence properly reinforces the ALJ's findings and conclusion that Respondent suspended the employees for having participated in the work stoppage as follows: Within 30 minutes of the beginning of the employee congregation and work stoppage, and certainly within 57 minutes (see factor 5 above), Respondent, by director Samayoa, began approaching individual congregants and telling them that they were suspended. An employer's failure to provide employees ample time to consider a demand that they choose between working or carrying on their protest off the employer's premises indicates that subsequent discipline of the employees is for having participated in the protest.[9]/ Moreover, when the work stoppage was less than two hours old, an employee spokesman asked Respondent's director of stewards to inform management that the employees, having failed to obtain the presence of management, were ready to go back to work (see factor 6 above). Respondent's response, that the congregants were all suspended, further shows that the employees were disciplined for participating in a protected work stoppage and refusing to return to work for somewhat less than two hours, and not for an asserted seizure of the Employee Cafeteria and asserted interference with services by other employees.

Management's reaction to the employee strikers' attempts to return to work further reveals the reason for its disciplinary actions. As noted at factor 6 above, the strikers began attempting to return to work about 9:50 a.m., when the work-stoppage was less than two hours old. Had Respondent been primarily concerned, as asserted, with the work stoppage's deleterious effects on

[9]/ Compare *Waco, Inc.*, 273 NLRB 746 (1984) (protest unprotected in part because three and one-half hours was ample time for employees to consider employer demand to return to work).

guest services and its alleged loss of sovereignty over its Employee Cafeteria, it could have resolved its concerns by immediately accepting the strikers' offer to return to work. The congregants' exodus to their job locations would have immediately emptied the Employee Cafeteria and at the same time cured the alleged decline in Hotel services. Instead, Respondent chose to tell the strikers that they could not return to work and were instead suspended, in what the reasonable congregant would see as retaliation for the work stoppage. *Brunswick Hospital Center,* 265 NLRB 803, 810 (1982) ("In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them."). As such, the ALJ's findings and conclusion that "Respondent had no valid reason to suspend its employees other than for the assertion of their rights guaranteed under Section 7 of the Act" is fully supported by the record.

11. Conclusion and Summary of the Facts and Case Law Supporting the ALJ's Quietflex Analysis in Finding and Concluding the Lawfulness of the May 11 Employee Cafeteria Congregation and Work Stoppage

The above factual and legal analysis of factors 1-4, 7, and 9 support the ALJ's findings and conclusions that the May 11 Employee Cafeteria event merited initially the protection of the Act: the unit employees stopped or delayed their work performance, and gathered in the Employee Cafeteria, to protest to the Employer about the suspension imposed on Union activist employee Reyes, clearly a protected concerted activity (Factor 1); the work stoppage was peaceful (Factor 2); the employees at no time deprived the Employer of access to its property, nor did they interfere with the work performance of nonparticipating employees (Factor 3); the employees did not have adequate opportunity to present their grievances to management (Factor 4); the employees were not represented and did not have access to an established grievance procedure (Factor 7); and they had not attempted to seize the Employer's property (Factor 9).

Moreover, the above discussions of factors 5, 6, 8, and 10 likewise merit to the ALJ's findings and conclusion that the May 11 event did not subsequently lose the protection of the Act. Although the Employer did warn employees repeatedly that they must leave the premises or face discipline, as properly ruled by the ALJ, those warnings were impermissibly premature (Factor 5). The duration of the work stoppage did not exceed that of other stoppages that have been found to retain the Act's protection (Factor 6). The employees did not remain on the premises beyond their shifts (Factor 8). Finally, although the Employer's stated reason for disciplining the employees was not to retaliate for their refusal to abandon the work stoppage and return to work, the Employer's decision to suspend the employees rather than accept their offers to return to work supports a conclusion that the employees were ultimately disciplined for their refusal to return to work (Factor 10).

Therefore, after analyzing the factors considered by the Board in determining whether a work stoppage is protected, and considering his credibility resolutions, the ALJ had more than sufficient and ample evidence and case law to properly find and conclude that the conduct of the May 11 employees herein enjoyed the protection of the Act and that the work stoppage did not become unprotected over the course of the approximately two hours of its duration. Accordingly, the ALJ's findings and conclusion that Respondent violated Section 8(a)(1) of the Act by suspending the 77 employees for five days for participating in this protected work stoppage and congregation as alleged in complaint paragraph 6 (ALJ Decision p. 17:33-34) must stand and Respondent's Exceptions on this point should be dismissed.

III. THE ALJ'S FINDINGS AND CONCLUSION THAT RESPONDENT'S DISCIPLINE OF EMPLOYEE CONTRERAS FOR PUTTING UP POSTERS PROTESTING HER BEING CALLED INSULTS BY HOTEL GUESTS, AS ALLEGED IN COMPLAINT PARAGRAPH NO. 11. (ALJ DECISION P. 20:46-47; P.21:1-3.), ARE SUPPORTED BY THE ADMISSIBLE EVIDENCE, RELEVANT CASE LAW, AND CREDIBILITY DETERMINARIONS

1. The Record Sustains the ALJ's Findings and Conclusion That Contreras' Actions in Putting Up the Posters Constituted Protected Concerted Activity

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law as noted above. In its brief, Respondent claims that there was insufficient evidence to establish that Contreras engaged in protected concerted activity. To the contrary, Contreras' mutual aid and protection as concluded by the ALJ could not have been more clear as set forth by the transcripts as follows:

In her role as a front desk agent, up to and including August 2006, Contreras was the recipient of, and was subjected to, verbal abuse from Hotel guests whose room reservations were not honored by the Hotel due to overbooking. (Tr. 144:19-145:5; 146:1-25.) Contreras was not at fault nor did she have any control over the overbooking problems caused by the Hotel. (Tr. 145:18-146:6; 146:18-25.) The verbal abuse Contreras suffered from guests included being called names such as "bitch," "crack head," "idiot," "sexy," "hottie," and "stupid." (Tr. 145:13- 147:3; 148:15-21; Jt. Ex. 1.) Other co-worker front desk agents including Daniella Urban and Maribel Sanchez were also subjected to verbal abuse from Hotel guests and shared their concerns with Contreras. (Tr. 145:6-16; 147:20-10.) Unlike the misleading assertions in Respondent's Exception's brief, Contreras on numerous occasions notified her supervisor Erick Burkhart of the verbal abuse she received from guests. (Tr. 147:3-149:12.) However, despite the fact she complained and specifically asked Burkhart for help and protection from such verbal abuse, Burkhart ignored her complaints and did nothing to resolve the situation. (Tr. 147:3-149:12.)

Believing that Respondent would not take any action to address their concerns, on about August 23, Contreras, Daniella Urban, and Maribel Sanchez met at Urban's home to come-up with a way to get Respondent to pay attention to their complaints of verbal abuse and do something about it. (Tr. 149:13-150:10.) As such, the three of them decided to draw two posters that would illustrate the inappropriate names the front desk agents had been called by Hotel guests and to

share it with their co-workers at the Hotel. (Tr. 150:22-153:5; Jt. Exs. 1-4; 181:21-182:14.)[10]/ Contreras, Urban, and Sanchez agreed they would hang the poster in the Employee Cafeteria during their break and each of them would give a short presentation about it illustrating to other coworkers the names front desk agents had been subjected to. (Tr. 152:9-10; 153:21.)[11]/ The posters read, inter alia: "Is it fair that the guests can call us names without recourse?"; "Is it right that the managers can put us down without reprimand?"; "Hilton relies on disrespect, but we deserve better!"; "Post one of the inappropriate names which you have been called." (Jt. Exs. 1 and 2)

On August 24, during her lunch break, Contreras went to the employee cafeteria and taped the posters to the wall next to where employees put away their cafeteria trays. (Tr. 153:22-154:2; 156:8-11.) The posters were hung in a non-working area and did not interfere with the work of any team member. (Tr. 2303:9-18.) There had been prior occasions when other employees had posted cultural posters, which were non-work related, in the Employee Cafeteria. (Tr. 154:14-155:2; 193:11-194:13.) Pursuant to their plan, for about 10 minutes, Contreras explained to employees in the cafeteria how front desk agents had been subjected to verbal abuse and that it was unfair that nothing could be done. (Tr. 156:12-157:8.) Other employees present sympathized with Contreras and shared similar concerns about having been disrespected and called names by Hotel guests (Tr. 156:23-157:4.) At the end of her presentation, Contreras finished her lunch and went back to work. (Tr. 157:5-8.) The two posters were up for about 45 minutes. (Tr. 164:14-165:18.) No employee complained about the posters to Contreras or to management. (Tr. 163:12-164:13; 2303:19-22.)

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[10]/ The two posters were also translated into Spanish so there 4 total posters in total. (Jt. Ex. 1-4.)

[11]/ The training nature of the poster was evidenced when Sue Trobough testified that John Curtis, the assistant director of safety and security, upon seeing it, called her wondering whether the poster Contreras had posted was part of Respondent's training. (Tr. 2052:14-2053:5.)

A few days later, on August 28, without even asking Contreras for her side of the story, Respondent issued her a written warning for having put up the posters. (Tr. 157:9-11; G.C. Ex. 4; 1446:19-1448:4.) When she received the warning, Contreras met with admitted Section 2(11) supervisors Erick Burkhart and Director of Human Resources Sue Trobough in Trobough's office where she was told her poster violated Respondent's workplace harassment policy. (Tr. 157:11-18.)

As the evidence made it clear, there can be no question that the ALJ's finding that Contreras' conduct in putting up the poster constituted protected concerted activity. The poster clearly bore a nexus to legitimate employee concerns about employment matters as it directly addressed work issues the front desk agents experienced at the Hotel-front desk agents being subjected to inappropriate name calling by Hotel guests. These work concerns were clearly discussed and shared by front desk agents Contreras, Maribel, and Urban and were translated into action by their collective decision to post their grievances in the Employee Cafeteria during their break and bring attention to it. Having received no response from Respondent after repeatedly asking Respondent to address the problem, front desk agents Contreras, Urban and Sanchez, not represented by a union, consequently were obliged "to speak for themselves as best they could." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). As such, there is ample evidence in the record for the ALJ's finding that Contreras' actions constitute protected concerted activity. As properly concluded by the ALJ, the discipline arising from Contreras' protected concerted activity in hanging the posters violated Section 8(a)(1).

2. The Record Supports the ALJ's Conclusion That Employee Contreras Did Not Violate Respondent's Work Harassment Policy. (ALJ Decision, p. 20:33-34)

The evidence supports the ALJ's findings and conclusion that Respondent's discipline of Contreras for an alleged violation of its Sexual Harassment Policy was without merit. First of all, it is unclear, which policy, if any, was allegedly violated by Contreras' posting. Aside from a

work-harassment policy, Hilton has no written rule prohibiting the posting of material in the cafeteria in the manner Contreras did. (Tr. 2303:23-2305:19.) Second, Respondent's claim that Contreras' postings violated its harassment policy crumbled under cross-examination as follows: Respondent's Director of Human Resources Sue Trobough first testified that Contreras was disciplined because her posting violated Respondent's "Harassment Free Policy," paragraph 4; she then explained said policy prohibited "unwelcomed sexual advances." (Tr. 2307:7-2309:10; Res. Ex. 30, p. 2.) However, on cross-examination, Trobough revealed Respondent's faulty reasoning by admitting Contreras's posting did not in fact constitute "unwelcome sexual advances" as defined by Respondent's policy. (Tr. 2308:22-25.)

Respondent's second witness, Erick Burkhart, who also tried to explain Respondent's justification in issuing the discipline to Contreras, likewise did not do much to elucidate said defense. Burkhart's explanation of the application of Respondent's harassment policy to Nathalie's posting was flawed in several respects. First, in justifying said discipline, Burkhart incredulously explained that Respondent's zero-harassment policy would result in discipline if an employee told another employee she was called "stupid, ignorant, [or] moron" by someone else. (Tr. 1489:19-22.) However, Burkhart contradicted his own justification by admitting just the opposite, that no discipline could issued under Respondent's harassment policy if the employee simply "was telling someone else that she was called those words, other than her calling those words to [someone] else." (Tr. 1490:10-19.) A such, by Burkhart's latter explanation, no discipline should have issued to Contreras as her posters simply told "someone else she was called those words."

Second, Burkhart unsuccessfully tried to explain that Contreras violated Respondent's harassment policy because her posters were put up in a place that other team members found offensive. (Tr. 1492:1-8.) However, the evidence revealed that absolutely no employees

complained about the posters to either management nor to Contreras. (Tr. 163:12-164:13; 2303:19-22.) Burkhart's reasoning is further weakened by the fact that the posters went up in the Employee Cafeteria, a non-working area, and the posters did not interfere with anyone's work. (Tr. 2303:9-18).

Moreover, Respondent's claim that Contreras' actions violated its harassment policy is weakened further by the "Harassment Free Work Place Policy" itself which allows and actually encourages employees to take action similar to that taken by Contreras to remedy the harassment she received. Respondent's Harassment Free Work Place Policy instructs employees as follows:

> "If you experience any conduct that you feel may be inconsistent with this [harassment] policy, Hilton encourages and expects you to notify the Director of Human Resources, your supervisor, or your department head. *Please take every step you can to make sure that your concern is known to management.*"

(Res. Ex. 28, Team Member Handbook, p. 18, 2nd Para.) (emphasis added). This is exactly what Contreras did. As noted previously, having received no response from Respondent after repeatedly asking Respondent to address the problem, Contreras, not represented by a union, consequently was obliged "to speak for [herself] as best [she] could" and take the necessary steps to make her concern was known to management. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). Respondent cannot pick and chose which portions of its harassment policy it wishes to enforce. As such, the ALJ's properly concluded that Respondent's discipline of Contreras for an alleged violation of its sexual harassment policy was without merit.

3. The Evidence Supports the ALJ's Finding and Conclusion That Contreras's Discipline Was a Pretext for Retaliating Against Her Protected Concerted Activity in Putting Up the Posters.

Finally, the ALJ's findings and conclusion that Respondent acted with pretext and exhibited disparate treatment in issuing the discipline to Contreras were likewise supported by the record herein. In particular, the evidence established that aside from Contreras, Respondent had never disciplined any employee for similar conduct of putting up a poster expressing to other

employees that they had been disrespected by Hotel guests. (Tr. 2305:20-2306:8.) In fact, other employees had posted non-work related posters in the employee cafeteria without any evidence that they were disciplined. (Tr. 154:14-155:2; 193:11-194:13.) The only difference why those employees did not get disciplined appears to be that those posters did not involve issues of mutual and protection as Contreras' posters exhibited. The only five examples of past violations of its harassment-free policy provided by Respondent to disprove disparate treatment were so different in comparison to Contreras' conduct that they were properly disregarded by the ALJ and should likewise be done by the Board. Those examples of prior violations of Respondent's harassment policy cannot be compared to Contreras' conduct in that those involved employees verbally abusing supervisors and/or each other in the context of altercations and threatening conduct. (Res. Exs. 36, 37, 38, 39-40, 41-42;Tr. 2133:13-2143:19.)

As such, the ALJ properly found and concluded based on the credible facts and applicable case law that Respondent's discipline of Contreras for putting up posters in the employee cafeteria protesting her being called insults by Hotel Guests violated section 8(a)(1).

IV. THE ALJ'S FINDINGS AND CONCLUSION THAT THE JUNE WARNINGS ISSUED TO SIMMONS, BRETNER, MAGALLON, SALINAS, AND GOMEZ VIOLATED SECTION 8(a)(3), AS ALLAGED IN COMPLAINT PARAGRAPH NOS. 21 AND 22 (ALJ DECISION P. 27:9-11), ARE SUPPORTED BY THE ADMISSIBLE EVIDENCE, RELEVANT CASE LAW, AND CREDIBILITY DETERMINATIONS

Contrary to Respondent's contention, the record fully supports the ALJ's finding and conclusions of law that Respondent unlawfully issued its discipline to each particular employee as more fully detailed below:

1. Patricia Simmons

The evidence established that Patricia Simmons, a 20-year employee who works for Respondent as a service waitress at the lobby café (Tr. 401:10-24.), openly participated in several Union delegations at the Hotel from January through May, including the January 30 delegation to

Human Resources and the May 11 Employee Cafeteria congregation and work stoppage. (Tr. 401:25-402-9; 405:22-25.) In fact, Simmons was instrumental in organizing the May 11 employee cafeteria congregation. (Tr. 406:22-412:20.) As such, Respondent admitted it knew Simmons was a known Union supporter in 2006.) (Tr. 2257:24-2258:25; 2259:14-2260:3.)

Simmons worked in June when Respondent, at its Hotel, hosted an event sponsored by the California Teacher's Association ("CTA"). (Tr. 440:21-441:17.) CTA held its annual event at the International Ballroom just off the Hotel lobby. (441:18-442:2.) The day before, June 2, Simmons had accepted an invitation from a CTA representative, a guest of the Hotel, to speak to attendees of the CTA in the International Ballroom about the 77 co-workers who had been suspended by Respondent on May 11. (Tr. 442:25-444:19.) As such, on June 3, Simmons punched out for her lunch break and walked over to CTA event being held in the International Ballroom. (Tr. 452:16-453:18.) A CTA guest had given Simmons a visitor's pass. (Tr. 458:6-19.) While at the CTA event, Simmons spoke for about 10 minutes about how Respondent on May 11 had suspended the 77 employees, including herself, for wanting to ask questions about the suspension of a co-worker. (Tr. 453:12-454:4.) Simmons did not say anything that would have jeopardized Respondent's business with the CTA. (Tr. 454:8-16.) Simmons still had 5 minutes left on her lunch break when she finished speaking to the CTA and she then went back to work. (Tr. 455:16-456:7.)

When Simmons returned to her work station, her supervisor, admitted Section 2(11) Assistant Director of Food and Beverages Manny Collera, and admitted Section 2(11) Director of Food and Beverage Tom Cook, were already waiting for her. (Tr. 456:12-457:2.) Cook asked Simmons where she had been and Simmons told him she had been on break in the International Ballroom. (Tr. 457:1-458:5; Resp. Ex. 19.) When Cook told Simmons that she was not supposed to be there during her break pursuant to Hotel policy, Simmons replied that over the past 20 years

she had been allowed to be in other guest events in the Hotel's ballrooms including AMMA and had never been told by a supervisor otherwise. (Tr. 457:1-458:5; Resp. Ex. 19.)

In fact, the admissible evidence proved that prior to June 3, Simmons had never been warned by any of her supervisors that she was not allowed to enter an event held at the Hotel's ballrooms during her break. (Tr. 459:25-460:3.) Likewise, prior to June 3, Simmons had never received a handbook explaining Respondent's alleged break policy regarding procedure to attend a particular event being held at the Hotel during her break. (Tr. 459:9-459:24; 460:6-462:17; 468:18-470:18, GC. Ex. 5, p. 1 hand written notes.) Nevertheless, on June 10, Director of Food and Beverage Tom Cook issued a written warning to Simmons for "violation of company policy . . Use of Location Facilities by Off-Duty Team Members," for "On Saturday, June 3rd, 2006, [being] in an inappropriate area of the Hotel (international ballroom) while on your break." (Tr. 465:4-467:22; CGC. Ex. 6.)

a. The Evidence Supports the ALJ's Findings and Conclusion That Respondent's Reason for Issuing Discipline to Simmons Does Not Stand Scrutiny and is Therefore Unlawful

Respondent's brief claims that Simmons was disciplined for speaking at the CTA event because: (1) she did not have her supervisor's permission to attend the CTA event and (2) because the CTA had not asked Respondent for permission to allow employees to attend its function. (Tr. 1614:5-15; 2319:18-2320:4; Res. Ex. 19.) However, as properly ruled by the ALJ, said claim was not supported by the record.

With respect to Respondent's first claim, it fails because there is nothing in Respondent's written policy alleged to have been violated by Simmons, to wit- "Use of Location Facilities by Off-Duty Team Members," that requires employees, while off-duty and/or during breaks, to get supervisory permission prior to attending functions like CTA. (CGC Ex. 5.) p. 2; 231-:21-2314:3.) On the contrary, as explained by Trobough, Respondent's "Use of Location Facilities by off-duty

Members" policy, *did not* prevent off-duty employees, including employees on break like Simmons, to attend events held at Respondent's ballroom. (Tr. 2318:25-2320:21.) Although Respondent's brief attempts to make up the new rule (and apply it to Simmons) that employees had to first obtain supervisorial permission prior to attending said functions, said fabrication as properly found by the ALJ crumbled when confronted by Respondent's policy itself, to wit-

> "This policy [Use of Location Facilities by Off-Duty Team Members] does not prevent off-duty team members from enjoying, as a guest, the Hotel's facilities such as the restaurant. However, for security and other business reasons, team members are *requested* to provide advance notice to and obtain the approval of the Hotel's senior manager prior to such use."

(Tr. 2317:12-13; 2320:5-16; G.C. Ex. 5.) p. 2.) (Emphasis added.) As established in the record, Sue Trobough admitted that off-duty employees, including employees on break like Simmons, were only "*requested*," but not "*required*," to provide advance notice to Hotel's senior management to attend any non-Hilton sponsored functions held at the Hotel. (Tr. 2319:10-2320:21; CGC. Ex. 5, p. 2). For these reasons, the ALJ properly concluded Simmons did not violate Respondent's policy as alleged.

With respect to the second reason, Respondent's brief was big on claims but short on evidence. As such, as if rehearsed, Director of Food and Beverage supervisor Tom Cook, Director of Human Resources Sue Trobough, and Assistant Director Rochelle Romo, readily testified that, unlike the CTA, Respondent had allowed its employees to attend other outside groups functions being held at the International Ballroom by groups such as "AMMA" (the hugging saint) and "Conscious life Expo," because said groups had notified Respondent in advance that they would allow employees to attend it, and Respondent had given permission to its employees to go. (Tr. 1567:8-1568:25; 2176:18-2177:10; 2212:13-2213:3; 2299:11-15.) However, when asked on cross-examination for any documentation to prove the claim, none was provided nor produced even though General Counsel subpoenaed it. Of further relevance, neither Cook, Trobough, or

Romo could even recall ever seeing an actual document supporting their alleged position. (Tr. 1603:1605:4; 2177:1-2178:1; 2299:10-2300:9.) In fact, Assistant Director of Human Resources Romo admitted she did not even know whether the alleged requirement that Respondent first had to grant employees the right to attend functions as a condition of going to them was even communicated to any employees. (Tr. 2213:4-2215:8.)

Finally, Simmons also testified that prior to June 3, she had never been warned by any of her supervisors that she was not allowed to enter an event held at the Hotel during her break, much less that she had to ask for permission to do it. (Tr. 459:25-460:3; 462:17; G.C. Ex. 5.) Simmons also testified that prior to June 3, she had never received a handbook explaining Respondent's alleged "Use of Location Facilities by Off-duty Team Members" break policy as to whether she could attend a particular event being held at Respondent's Hotel during her break. (Tr. 459:9-459:24; 468:18-470:18.) In fact, Simmons was so surprised by Respondent's claim that there was such a rule in its books, she made sure to document that she had never been advised of such rule nor given the handbook containing said rule. (Tr. 460:6-462:17; G.C. Ex. 5, p. 1 hand written notes.)

Because Respondent's stated motives for its actions were not supported by the facts, the ALJ's findings and conclusion that the true motive for its discipline of Simmons was an unlawful one that the Respondent desired to conceal was proper. *Flour Daniel, Inc., 304 NLRB 970, (1991)*

2. Lilia Magallon

Magallon has worked for Respondent as a lobby attendant for 23 years (Tr. 584:15-24.) and was one of the employees who participated in the May 11 congregation in the Employee Cafeteria to protest the suspension of her co-worker, and was suspended for such participation. (Tr. 590:10-591:2; 596:13-598:12; 643:15-644:11; CGC Ex. 7.) Respondent admitted it knew that

Magallon participated in Union activities and was a known Union supporter in 2006. (Tr. 2257:24-2258:25.)

During 2006, Magallon was responsible for cleaning the first floor lobby where the International Ballroom is located. (Tr. 584:23-585:24; Res. 5.) Magallon also emptied the trash cans outside of the doors to the International ballroom; these trash cans sometimes held the doors to the International Ballroom open while an event was being held there. (Tr. 589:10-590:4; 663:8-17; 664:8-665:10.) Magallon, as customarily, worked cleaning the lobby on June 3 when the CTA held its event in the International Ballroom. (Tr. 598:15-599:20; Res. Ex. 5.) At about 10:30 a.m., upon request from one of the CTA teachers, Magallon went looking for her co-worker Isabel Bretner. (Tr. 604:22-606:5.) It was established Hotel policy to try to help and respond to Hotel guest's requests. (Tr. 612:23-613:1; 2046:15-2047:25; Res. Ex. 28, Handbook p. 70.)

Magallon did not find Isabel Bretner but when Magallon came back to her work area near the International Ballroom and continued to work as usual when she overheard Isabel Bretner already speaking from inside the International Ballroom. (Tr. 606:6-608:10; 627:1-10.) At no time during incident, did Magallon step inside or go inside the International Ballroom. (Tr. 608:15-18.) Magallon's testimony that she did not enter the International Ballroom was corroborated by Patricia Simmons and Izabel Bretner, who both spoke at the CTA on June 3 during their break, as well as by lobby attendant Juana I. Salinas who also worked on June 3. They all testified that at no time did they see Lilia Magallon enter the International Ballroom. (Tr. 454:21-455:12; 754:20-755:2; 905:5-7.) Later in the afternoon, Magallon's manager, Veronica Rosales, asked her if she (Magallon) had gone inside the International Ballroom to which L. Magallon said "no."

A few days later, on about June 7,Magallon was called into the office of Housekeeping Director Ana Samayoa and Magallon was issued a written warning for allegedly entering the

International Ballroom. (Tr. 610:1-613-614:4; G.C. Ex. 7.) Magallon was not asked for her side of the story before being given the warning. *Id.* During the meeting with Samayoa, although to no avail, Magallon repeated to Samayoa that she had not gone inside the International Ballroom and explained to her that she had simply been cleaning the trash cans outside the International Ballroom. (Tr. 611:17-613:1.)

Magallon testified that there had been several occasions prior to the June 3 CTA event when, in the presence of her supervisors and while she was working and not on break, she had entered the International Ballroom during events held in the International Ballroom by Hotel patrons such as AMMA and the Esmeralda Dancers, and no discipline issued to her. (Tr. 614:5-617:17.)

3. Juana Isabel Salinas

Salinas has worked for Respondent as a public areas lobby attendant for 23 years (Tr. 888:1-9.) and participated in the May 11 employee cafeteria congregation and was suspended as a result of it. (Tr. 891:20-892:16; G.C. Ex. 11, p.63.) As such, Respondent admitted it knew Salinas was a known Union supporter in 2006.) (Tr. 2257:24-2258:25.)

During 2006, Salinas was responsible for cleaning the restrooms, ashtrays, and trash cans in the Hotel lobby where the International Ballroom is located. (Tr. 888:10-889:21; Res. Ex. 6.) Her responsibilities included cleaning ashtrays that also served as trash cans immediately outside the doors of the International Ballroom. (Tr. 889:22-891:19; Res. Ex. 6.)

Salinas worked cleaning her usual lobby area on June 3, the day the CTA held its function in the International Ballroom. (Tr. 893:8-894:7.) It was a very busy day and Salinas cleaned trash cans that were holding the doors open to the International Ballroom. (894:8-896:25.) At no time did Salinas enter the International Ballroom. (Tr. 898:10-15.) Salina's testimony that she did not enter the International Ballroom was corroborated by Patricia Simmons and Izabel Bretner, who

both spoke at the CTA function during their break, as well as Magallon who worked that day in the lobby area. They all testified that at no time did they see Salinas enter the International Ballroom. (Tr. 454:21-455:12; 754:13-18; 686:18-687:14.)

A few days later, on about June 7, Salinas was called into admitted Section 2(11) Director of Housekeeping Ana Samayoa's office and given a written warning for allegedly having gone into the International Ballroom on June 3. (Tr. 898:16-899:19; G.C. Ex 10.) Salinas was not asked for her side of the story before being given the warning. *Id.* When Salinas met with Samayoa to get the warning, although to no avail, Salinas explained to Samayoa that she never entered the International Ballroom on June 3, that Salinas had simply cleaned the trash cans near the International Ballroom which had been very full as a result of a very busy day. (Tr. 899:19-903:3.)

In any event, several other co-workers testified that there had been various occasions prior to the June 3 CTA event, when, in the presence of their supervisors and while both on break and on duty, they entered the International Ballroom while events were being held there by Hotel patrons such as AMMA and the Esmeralda Dancers, and no discipline issued to them. (Tr. (Magallon) 614:5-617:17; (Bretner) 758:20-765:2; 771:14-773:11; 789:22-790:11; (Simmons) 445:17-449:13; 614:5-617:17.)

4. Izabel Bretner

Izabel Bretner ("Bretner") has worked for Respondent as a lobby attendant for 20 years (Tr. 743:11-744:2.) and also participated and publicly spoke at the January 30 employee delegation held in front of Respondent's human resources offices and she also led a delegation in March to protest the firing of a co-worker. (Tr. 745:2-749:24; 2123:9-25.) Bretner also attended the May 11 Employee Cafeteria congregation and was suspended for it. (2334:20-2335:12; G.C. Ex. 11, p. 13.) Respondent admitted it knew Bretner was a known union supporter in 2006. (Tr. 2257:24-2258:25.)

Bretner was responsible for cleaning the first floor lobby where the International Ballroom is located. (Tr. 744:3-22; Res. 5.) Bretner worked cleaning her usual first floor lobby area on June 3 when the CTA held its event at the International Ballroom. (Tr. 749:25-752:7.) On June 3, at about 10:30 a.m., she was asked by a CTA teacher and Hotel guest if she could go to their event. (Tr. 752:25-753:20; 788:22-789:3; 788:22789:12.) It was established Hotel policy to try to help and respond to Hotel guest's requests. (Tr. 612:23-613:1; Res. Ex. 28, Handbook p. 70; .2046:15-2047:25.) Pursuant to such Hotel guest's request, at about 11 a.m., after punching out for her lunch break, Bretner went into the International Ballroom for about 15 minutes to address the CTA teachers and to thank them for a donation CTA had given to the 77 employees that was suspended by Respondent on May 11 at the Employee Cafeteria. (Tr. 753:13-754:12.) Bretner returned to the cafeteria to finish her break. (Tr. 758:16-20.)

A few days later, on about June 7, Bretner received a written warning for having attended the CTA event while on break on June 3. (Tr. 765:3-10; G.C. Ex. 9.) On that day, just like other lobby attendants, Magallon and Salinas, Bretner was called into Director of Housekeeping Ana Samayoa's office to receive the warning. (Tr. 765:9-766:7.) Even though Bretner explained to Samayoa that the warning was unfair because she had entered the International Ballroom *during her break*, Samayoa nevertheless issued her the written warning. (Tr. 766:11-767:12.) At no time prior to being issued the warning was Bretner asked for her side of the story. (Tr. 766:11-767:12.) Even though Bretner had gone into the CTA event during her break, the written warning issued to her incorrectly stated that Bretner violated company policy by "On Saturday, June 3, 2008, you were seen in an inappropriate area of the Hotel (International Ballroom) *during working hours when you were not on break.*" (G.C. Ex. 9 (emphasis added).)

Nevertheless, Bretner testified that in occasions prior to June 3, she had entered the International Ballroom to see the Emerald Dancers in the presence of admitted Section 2(11)

security manager Graham Taylor, and also while on break, without receiving any discipline. (758:20-765:2; 771:14-773:11; 789:22-790:11.)

a. The Evidence Supports the ALJ's Findings and Conclusion That Respondent's Reason for Issuing Discipline to Bretner, Magallon, Salinas and Gomez, Does Not Stand Scrutiny and Was Unlawful.

First, with respect to Magallon and Salinas, as the ALJ correctly found, they categorically denied having entered the International Ballroom on June 3, the day of the CTA event. This fact was also corroborated by Patricia Simmons and Izabel Bretner, who both spoke at the CTA on June 3 and who were in a position to see which, if any, of their co-workers entered the International Ballroom. (Tr. 454:21-455:12; 754:20-755:2; 905:5-7.) With respect to Bretner, like Simmons above, her actions in speaking to the CTA constituted protected concerted activity.

Second, as properly concluded by the ALJ and as supported by the record, there is nothing in Respondent's "usage-area" policies preventing off-duty employees like Bretner from attending functions held at the Hotel (such as the CTA which invited Bretner). (Tr. 2317:12-13; 2320:5-16; CGC. Ex. 5, p. 2.) In fact, Director of Human Resources Sue Trobough admitted that its "area-usage" policies, such as its "Use of Location Facilities by off-duty Member" policy, did not prevent off-duty employees, including employees on break like Bretner, from attending conventions held at Respondent's ballrooms. (Tr. 2318:25-2320:21.)

Third, Respondent's investigation pertaining to the discipline was substandard and apparently tailored to manufacture an alleged "unauthorized or non-designated area" policy violation which never existed and/or was applied discriminatorily to Bretner, Magallon, Salinas, and Gomez. In this respect, neither Bretner, Magallon, Salinas, and Gomez, nor any other witness, was ever questioned about her whereabouts or their side of the facts prior to the issuance of the discipline in question. (Tr. 611:17-614:4; 898:16-899:19; 766:11-767:12; 2198:3-2200:6.) In other words, as properly ruled by the ALJ, prior to issuing their discipline, Respondent never

considered crucial factors such as the fact that neither Magallon, Salinas or Gomez in fact ever entered the International Ballroom (Tr. 608:15-18; 898:10-15); that the reason why Bretner, Magallon, Salinas, and Gomez were seen in Respondent's Video Ex. 27 near the doors of the International Ballroom was due to their fulfillment of their job duties in emptying and cleaning the trashcans that were holding the doors open to the CTA International Ballroom on that very busy June 3 day (Tr. 589:10-590:4; 663:8-17; 664:8-665:10; 894:8-896:25); or that Bretner and Simmons had gone to the CTA on their break and only in response to an invitation by the CTA itself. (Tr. 752:25-753:20; 788:22-789:3; 788:22789:12.) So substandard was Respondent's investigation into this matter, that even though it was undisputed that Bretner had entered the International Ballroom during her break time (Tr. 753:13-754:12.), Respondent, nevertheless, incorrectly accused her in her written discipline to have entered the International Ballroom "On Saturday, June 3, 2008, . . . during working hours when you were not on break." (CGC. Ex. 9 (emphasis added)

Fourth, Respondent's claim it had some smoking gun video tape evidence (Res. Ex. 27 (CTA-Video) proving Bretner, Magallon, Salinas, and Gomez had improperly entered the International Ballroom proved to be nothing but smoke and mirrors and unnecessarily extended the length of the hearing. In this regard, assistant Director of Human Resources Rochelle Romo testified she was primarily responsible for viewing the June 3 CTA–related video tapes which she alleged led to the discipline here at issue. (Tr. 2146:1-2147:1; Res. Ex. 27.) Romo testified she concluded from watching the CTA video security tapes (Res. Ex. 27) that Magallon, Salinas, Bretner, and Gomez had improperly entered the International Ballroom. (Tr. 2146:11-2161:19.) However, as pointed by the ALJ, Romo admitted she did not in fact see from the CTA security video tapes whether Lilia Magallon, Isabel Salinas, Juana Gomez, and Izabel Bretner, had actually entered the International Ballroom. (Tr. 2179-2181; 2185:22-25.) Romo admitted the CTA video

she watched did not show the actual doors to the International Ballroom; the video showed only an empty space next to a column leading to the International Ballroom where she claims she saw them go into. (Tr. 2179-2181; 2185:22-25; Res. Ex. 27, time: 10:35; 10:46.) It is noted the doors through which she claims she saw the lobby attendants step into the International Ballroom cannot be seen in the video. (Tr. 2185:22-2186:5; 2186:24-2187:5.) In summary, Romo's testimony only established that she *assumed* Lilia Magallon, Isabel Salinas, Juana Gomez, and Izabel Bretner had entered the International Ballroom; Romo in fact never saw any of them actually enter the International Ballroom. (Tr. 2179-2181; Res. Ex. 27, minutes 10:35 and 10:46.)

As such, the evidence properly justifies the ALJ's findings and conclusion that Respondent's justification for the discipline in question cannot stand.

5. The Full Record Supports the ALJ's Findings and Conclusions of Law That Respondent's "Use of Location" Policy was Disparately Applied and Was Used as a Pretext to Discipline Simmons, Bretner, Magallon, Salinas and Gomez. (ALJ Decision p. 26:43-45)

The Board has ruled that the application of an otherwise lawful work rule to prevent movement through the jobsite when applied discriminatorily to union supporters, such as here, violates Section 8(a)(1) and (3) of the Act. *Thermon Heat Tracing Services Inc.*, 320 NLRB 1035, 1038 (1996).

Respondent's contention that Simmons, Bretner, Magallon, Salinas, and Gomez were disciplined for violation of "The hotel's Team Member Handbook specifically stat[ing] that it is a violation of company policy for being in an unauthorized or non-designated work or guest area during scheduled work periods, or on your days off, without your supervisor's or management's specific authorization" (CGC Exs. 7; 9, and 10.) must fail as it was clearly discriminatory as applied to them as established for the following reasons as correctly noted by the ALJ's findings and conclusions.

First, through Sue Trobough and Tom Cook's testimony, Respondent attempts to make up a new rule that employees had to first obtain supervisorial permission prior to attending functions held by Hotel guests in the ballrooms (such as the CTA), said fabrication did not stand scrutiny when confronted with Respondent's own policy, to wit-

> "This policy [Use of Location Facilities by Off-Duty Team Members] does not prevent off-duty team members from enjoying, as a guest, the Hotel's facilities such as the restaurant. However, for security and other business reasons, team members are *requested* to provide advance notice to and obtain the approval of the Hotel's senior manager prior to such use."

(Tr. 2317:12-13; 2320:5-16; G.C. Ex. 5.) p. 2.) (Emphasis added.) Supervisor, Sue Trobough admitted that off-duty employees, including employees on break like Bretner, were only *requested*, not "*required*," to provide advance notice to Hotel's senior management to attend any non-Hilton sponsored functions held at the Hotel. (Tr. 2319:10-2320:21; CGC Ex. 5, p. 2). For this reason, Respondent's rationale for issuing said disciplines must fail.

Second, and as properly found by the ALJ, prior to the Union organizing drive, other employees had accepted numerous invitations to attend functions held by outside organizations taking place in the same International Ballroom, and in fact entered said ballroom to attend them, without being disciplined and without having to ask for permission from their supervisor. (445:17-20; 449:14-17.) For example, prior to June 3, Simmons had accepted invitations from AMMA, Life Expo, and Esmerald Dancers to attend their events being held at the International Ballroom without any discipline. (Tr. 445:17-449:13; 614:5-617:17; Res. Ex. 19.)

Third, the evidence also established that Bretner, Magallon, and Salinas on numerous occasions prior to the Union organizing drive and prior to the June 3 CTA event, both in the presence of supervisors and without having asked for permission, had entered the International and other ballrooms to attend functions, both while on duty and on break, and had never been disciplined for it. For example, lobby attendant Magallon, on several occasions prior to the June 3

CTA event, in the presence of her supervisors and while she was working and *not* on break, entered the International Ballroom during events held therein by Hotel patrons such as AMMA and the Esmeralda Dancers, and no discipline issued to her. (Tr. 614:5-617:17.) Likewise, lobby attendant Isabel Bretner, on occasions prior to June 3, while on break, had also entered the International Ballroom to see the Emerald Dancers in the presence of admitted Section 2(11) security manager Graham Taylor without receiving any discipline. (758:20-765:2; 771:14-773:11; 789:22-790:11.)

Fourth, and as pointed by the ALJ, there were other similar incidents where employees were found to be in unauthorized areas in violation of Respondent's "Use of Public Areas" policy, yet they were not disciplined for it nor did Respondent conduct an investigation into the matter as it did with the discipline of Simmons, Bretner, Magallon, Salinas, and Gomez. For example, Respondent's Director of Human Resources Sue Trobough testified that restrooms that were next to the lobby café private room were considered a public area and as such, they were not to be used by employees under Respondent's "Use of Public Areas" policy. (Tr. 2313:17-2315:7; Res. Ex. 28, p. 61; Res. Ex. 6.) Yet, during 2006, when lobby attendants complained to Sue Trobough that employees were improperly entering and using said restrooms next to the lobby café private room, Respondent simply closed the restrooms, and unlike the instant case, did not initiate any investigation into such policy violations, nor did Respondent issue any discipline to the offending employees. (Tr. 2295:15-2299:8; 2313:17-2317:3; Res. Ex. 28, p. 61, Res. Ex. 6.) This disparate treatment occurred despite Sue Trobough's admission that employees' unauthorized used of said restrooms was a violation no different than employees walking into an unauthorized ballroom (as Simmons did). (Tr. 2317:4-8.) Although Respondent's counsel tried to cure the apparent discrimination of equals on redirect questioning of Trobough, she was unable to give an adequate reason for such disparate treatment, except for the obvious reason that one, Simmons' entrance to

the public ballroom was Union related, whereas the other one, entrance to a public-use bathroom was not. (Tr. 2343:13-2349:6.)

Fifth, Respondent was not able to provide even one instance of prior discipline issued to Simmons, Bretner, Magallon, Salinas, and Gomez, for physically entering a location facility, such as a ballrooms, public restroom or any other physical enclosed location, in violation of any "area usage" policies. The only three examples that Respondent provided alleging to be past disciplines for "unauthorized area" violations involved employees use/taking of Respondent's property and were so different than that of Simmons, Bretner, Magallon, Salinas, and Gomez' alleged misconduct that they should be disregarded. (Tr. 2128:4-2133:12.) To wit- Respondent's first example dealt with an employee's apparent embezzlement of a vehicle shuttle which was driven to a different hotel. (Res. Ex. 31) The second example dealt with two employees unauthorized use of Respondent's pool. (Res. Exs. 32 and 33.) The third example dealt with an employee's taking aluminum cans from the Hotel to his car accompanied by accusations that said employee could be subjected to searches if there were missing items in his banquet room area. (Res. Ex. No. 34.)

As such, the ALJ properly found and concluded based on the credible facts and applicable case law that that Respondent's "Use of Location" Policy was disparately applied and was used as a pretext to discipline Simmons, Bretner, Magallon, Salinas and Gomez as alleged in Complaint Paragraph Nos. 21 and 22.

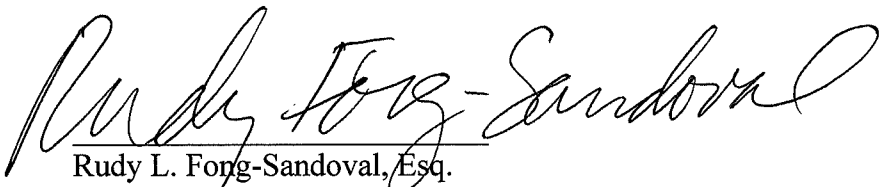
V. CONCLUSION

It is clear that the ALJ's entire decision is squarely supported by the relevant record, applicable case law, and credibility resolutions. Because Respondent's Exceptions brief is substantially based on exceptions to the Administrative Law Judge John J. McCarrick's (ALJ) credibility findings which Respondent did not prove should be overturned under the test set forth

in *Standard Dry Wall Products*, 91 NLRB 544 (1950), Respondent's request to overrule the ALJ decision should be dismissed.

Dated at Los Angeles, California, this 30th day of January 2009.

Respectfully submitted,



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Re: Fortuna Enterprises, L.P., a Delaware Limited Partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers
Case Nos.: 31-CA-27837, 31-CA-27954 and 31-CA-28011

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO THE RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** on the parties listed below, on the 30th day of January, 2009.

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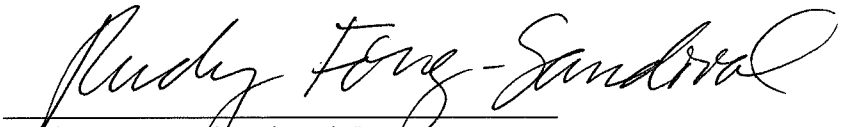

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